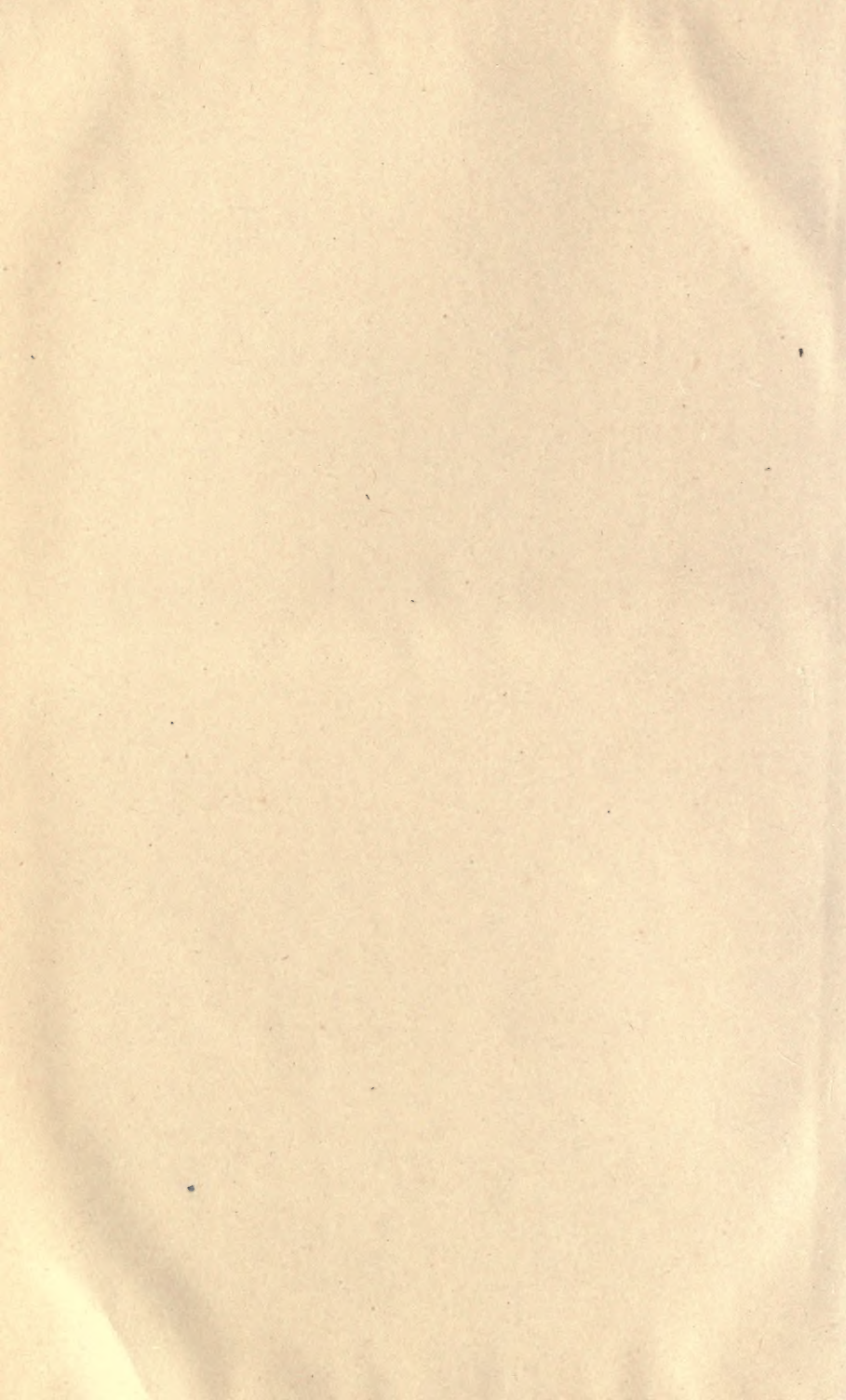


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New York (State) Reports.

REPORTS
OF
PRACTICE CASES,
DETERMINED
IN THE
COURTS OF THE STATE OF NEW-YORK:

WITH
A DIGEST OF ALL POINTS OF PRACTICE EMBRACED IN THE STANDARD
NEW-YORK REPORTS ISSUED DURING THE PERIOD
COVERED BY THIS VOLUME.

BY
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AND
AUSTIN ABBOTT,
COUNSELORS AT LAW.

NEW SERIES.

VOL. I.

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ABBOTTS' PRACTICE REPORTS.

NEW-YORK.

NEW SERIES.

HUBBELL *against* FOWLER.

Supreme Court, Fifth District; Special Term, November, 1865.

PLEADING.—REQUIRING REPLY.

An answer interposing the Statute of Limitations, presents a proper case for the Court to require, on defendant's motion, that the plaintiff reply.

It is not generally essential that the defendant, in moving to compel such reply, should state that he does not know the ground on which the plaintiff intends to rely to defeat the bar of the statute.

Motion that plaintiff be required to reply to the first defence contained in defendant's answer.

The action was upon a promissory note, to which the defendant pleaded, first, the statute of limitations; secondly, payment. The affidavit in support of the motion showed that the summons was in fact served more than six years after the maturity of the note sued upon, and that the defendant was advised by counsel that it was necessary for the proper defence of the suit, that the defendant's counsel should be informed before the trial in what way the plaintiff expected to defeat the operation of the statute. There were also the usual affidavits of merits.

*Discontinued
63 Nov, 168,*

Hubbell v. Fowler.

D. C. Calvin, for the defendant.

W. Hammond, for the plaintiff.

MULLEN, J.—In this case the defendant has pleaded the statute of limitations, and now asks for an order requiring the plaintiff to reply to the plea, by specifying the grounds which he relies upon to defeat the operation of the statute.

The case is not one in which, by the Code of Procedure, the plaintiff is bound to reply, or the facts stated in the answer will be taken as admitted. But the application is made under section 153 of the Code, which provides that in cases other than where a counter-claim is set up in the answer, if the answer contains new matter constituting a defence by way of avoidance, the Court may, in its discretion, on the defendant's motion, require a reply to such new matter.

The case before me is one in which the Court has power to require a reply.

To introduce the practice of requiring a reply in all cases which may come within the terms of the clause of the section cited, is to multiply motions not only unnecessarily but unreasonably. In many, if not in most, cases, the defendant knows with reasonable certainty the answer which will be given to his defence; and there can be no reason for a motion to enable him to ascertain a fact of which he is already cognizant.

There are, however, very many cases in which the defendant may not know the answer which the plaintiff may make to the new matter in his defence because it may be matter affecting the plaintiff personally, or the business may have been transacted on the part of the defendant by an agent, or there may be, as in the case before me, a large number of answers which may be insisted on by way of reply to the new matter of the answer, all of which it would be unreasonable to require the defendant to prepare to meet on the trial, although the matter to be replied to may be presumed to be known to him personally.

The bar by reason of the running of the statute of limitations may be defeated in several different ways.

1. By the commencement of an action within the time limited.

2. By an attempt to commence such action as prescribed in § 99 of the Code.

3. By absence of defendant from the State when the right of action accrued.

4. If the plaintiff was under twenty-one years, or

5. Insane, or

6. Imprisoned on a criminal charge, or

7. A married woman.

8. Death of the person having the right of action before the time limited expired.

9. That the plaintiff was an alien, subject or citizen of a country at war with the United States.

10. Actions brought to judgment recovered, and reversed on appeal.

11. Stay by injunction.

12. A new promise.

To this last may be added others, unnecessary to enumerate; but the list is sufficiently formidable to show how difficult it may be in many cases to know on what ground the plaintiff intends to defeat the bar of the statute.

If there is any case in which it is proper to require a reply, it seems to me this is the one.

It was suggested by counsel that the defendant should be required to aver that he does not know the ground on which the plaintiff intends to rely to defeat the bar. While this may in some cases be very proper, yet in most instances the nature of the defence, and the manner in which the business was conducted out of which the action or defence accrued, will afford a much better guide in determining the propriety of requiring a reply. In this case I do not deem it essential.

Let an order be entered requiring the plaintiff to serve a reply to the answer setting up the statute of limitations within twenty days from service of copy order ; the costs of the order, \$10, to abide event of the suit.

ROBERT *against* DONNELL.*Court of Appeals ; March Term, 1865.*MARINE COURT OF NEW YORK.—UNDERTAKING ON APPEAL.—
CONSTRUCTION OF STATUTE.

The Act of 1853, (Chap. 617, § 5)—directing the mode of appeal to the general term of the Marine Court,—makes sections 348 and 335 of the Code of Procedure applicable to appeals in that Court.

On an appeal from a single Judge of the Marine Court to the general term of that Court, if a stay of proceedings is wanted, security must be given as on a similar appeal in one of the Superior Courts, and an undertaking given for that purpose is valid.

Where an appeal has been properly taken, in the Marine Court, from the decision of a single Judge to the general term, no single Judge of the Court has the power to dismiss the appeal.

Appeal from the General Term of the New York Common Pleas affirming an order dismissing the plaintiff's complaint.

The action was brought by Thomas Robert against James Donnell and William Good. The plaintiff had previously recovered a judgment in the Marine Court of the City of New York for \$489 70, against one Ezekiel Donnell, who appealed to the General Term of the Marine Court, where the judgment was affirmed. The notice of appeal in that former suit was served on the 31st of December, 1855, and on the same day an undertaking was executed by the defendants in the present action for the amount of the judgment, &c., on which undertaking this action was brought in the Court of Common Pleas. Subsequently, on motion of the plaintiffs in the suit in the Marine Court, the appeal was dismissed by a single Judge. This latter order was afterwards vacated by the same Judge.

On the trial of the present action, the plaintiff's counsel offered in evidence an order made by the Justice who tried the cause in the Marine Court requiring the defendant to give security, or in default thereof that the stay of proceedings be

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vacated. This was objected to and ruled out by the Court, which ruling was excepted to by the plaintiff.

The plaintiff having rested, the defendants moved for a dismissal of the complaint on the grounds—1. That the undertaking was void as being without consideration, and as not authorized by any statute; 2. That the appeal had been dismissed by one of the Judges, and that, therefore, no cause of action was proved.

The Court then ordered that the complaint be dismissed, to which the plaintiff excepted, and appealed from the decision to the General Term; the decision of that Court is reported in 10 *Abbotts' Practice Reports*, 454. The General Term affirmed the order, and the plaintiff appealed to the Court of Appeals.

Henry Brewster, for the appellant.

I. This undertaking is authorized by the Statute, and binding within all the cases.

By the act of 1853, § 5, of chap. 617, p. 1166, it is, among other things, enacted in relation to the Marine Court, as follows :

“An appeal may be taken upon the same from a judgment entered by the direction of a single Justice of the said Court to the Justices thereof, at a General Term, in the *same manner* and with the *like effect*, as appeals in the Supreme Court, from the decision of a single Judge to the General Term.”

Thus both as to the manner and effect, the appeals resemble appeals in the Supreme Court. The statute is very concise.

It neither fixes the time for appeal, notice, manner of service, or the proceedings of the Appellate Court, the right to a stay, or the terms of staying proceedings, or the matter of *security*; save by a reference to appeals in the Supreme Court. For these we must look first to the Code, § 348. That section refers, as to *security*, to the provisions in relation to the appeals to the Court of Appeals; for that we refer to § 355. That is as to the effect. But the hearing must be in the manner mentioned in chap. III., §§ 344 to 347. Then §§ 327, 330, 332 of the Code apply to the appeals mentioned in § 348; and, therefore, to appeals in the Marine Court. Nor are we entirely without

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authority on this point. *The People v. Clerk of the Marine Court*, 3 *Abbotts' Pr. Rep.*, 309.

Judge Mitchell, giving the opinion of the Court, says of this statute: "The *manner* relates to the mode of effecting an appeal, the *notice* and *security* to be given; the *effect* relates to the consequences produced by the appeal, as under what circumstances it shall operate to stay proceedings."

II. If this intention is not plain on the face of the statute, it is there by a fair construction.

Analogous statutes aid in arriving at the intention. (*Dwaris on Stat.*, 690.) The meaning is to be gathered from the occasion of the law. (*Id.* 693-4.) The mischief here to be remedied is with the enlarged jurisdiction, the greater injury from erroneous judgments. The object is to give facility for a review before three Judges as a remedy for any haste, prejudice, or mistake of one Justice, and to furnish two appeals, as giving a reasonable assurance against unjust judgments. (See Report of Commissioners of Code, pp. 22, 23.) Intent may be ascertained by comparison of one law with other laws on the same subject. They are compared because framed on one system. (*Id.* 699.)

III. When a new statute gives an action in a new case upon a former statute, everything annexed by the first is given. (*Id.* 700.) This statute refers to appeals in Supreme Court, and in giving a new appeal to be taken in the *same manner* and with *like effect*, it carries all things annexed to such previous appeal. The object of law is the attainment of justice. (*Id.* 727. 755.) Statutes *in pari materia* are construed together. (9 *Cowen*, 437; 5 *Hill.*, 221.) *Likewise*, and in like manner, are held to couple the previous branch of the statute by reference. The question of a stay of proceedings pending the appeal is very important. Appeals by all laws in all countries, with few exceptions, stay proceedings.

But to prevent collecting money *security* has usually been required.

IV. The appeal was pending, and the affirmance good and binding.

The order of Justice McCarthy, so far as it purported to dismiss the appeal, was a nullity.

The appellate Court only, can dismiss an appeal. (1 *Whitaker Pr.*, 189; *Fort v. Bard*, 1 *Comst.*, 43; *Id.*, 126, 228, 429, 429, 430, 606; *Barnum v. Seneca Co. Bank*, 6 *How. Pr.*, 82; *Harris v. Clark*, 10 *How. Pr.*, 419-20.) The Judge had power to revoke the order—at all events the Marine Court were proper judges of the regularity of the proceedings in that Court, and they held the appeal pending and affirmed the judgment. (*Barker v. Binninger*, 4 *Kern.*, 270; *The People v. Gale*, 16 *How. Pr.*, 199; *Griswold v. Sedgwick*, 1 *Wend.*, 126; *Beynolds v. Corp*, 3 *Caines*, 267.) There is no time within which an appeal must be brought on. Either party may notice it and get it disposed of; but until that is done it is pending. The liability of the sureties continues through all the proceedings. Suppose a judgment reversed by default. The reversal discharges the sureties; but if the reversal is set aside and default opened, surely the undertaking remains good. Delay does not affect the surety, where the default is non-payment of money. (*Daniels v. Patterson*, 3 *Comst.*, 47; *Robinson v. Plimpton*, 25 *N. Y. Rep.*, 484; and cases there cited. That the sureties were not entitled to notice, see *Blue v. Stout*, 3 *Cowen*, 354; *Burrall v. Vanderbilt*, 6 *Abbotts' Pr.*, 70; 1 *Bosw.*, 637.)

Moses Ely, for respondents.

I. The instrument in suit expressed no consideration on its face, and it was not pretended at the trial that any consideration was ever given or received therefor, or even that it was ever delivered, except as an undertaking to stay proceedings on a judgment, pending an appeal therefrom. Unless, therefore, it operated to stay proceedings on a judgment described in it, it was *nudum pactum*.

II. The instrument, treated as intended to be an undertaking under the Code, to stay proceedings on a judgment, pending an appeal therefrom, did not operate to stay proceedings on that judgment.

1st. Because it was not accompanied by the affidavit required by Sec. 341 of the Code. 2d. Because its delivery, as such an undertaking, was not complete. Service of a copy on the adverse party, with notice of appeal, was essential to such

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delivery. (Code, Sec. 340.) Up to the time of making such service, the appellant, (notwithstanding the filing of the original undertaking,) gives no perfect expression of his choice of a stay, and is not entitled to it. In this case there is no evidence that he ever served a copy of this paper. 3. The evidence fails to disclose when the original was filed. To show a consideration, by reason of its having operated as a stay of proceedings, it should have been proved affirmatively that it was filed, at least *some* time, before the appeal was terminated.

III. The statutes providing for stays of proceedings, by undertaking, do not relate to appeals of the General Term of the Marine Court. Such appeals are only authorized to be taken "in the same manner, and with the like effect as appeals to the Supreme Court from the decision of a single Judge to the General Term," (Laws of 1853, *Ch.* 617, § 5,) in which the undertaking to stay proceedings is merely collateral to the appeal, and in no sense essential to its validity, or as part of its machinery. (*Kitching v. Diehl*, 40 *Barb.*, 433.) When the instrument involved in this case was given, the only appeals to which an undertaking was essential were those to the Court of Appeals. (Code, Sec. 334.)

IV. The appeal in this case having been dismissed, the sureties were, at the moment of dismissal, released; (*Drummond v. Husson*, 4 *Kernan*, 60,) and it is absurd to claim that the vacation of the order effecting the release, on motion of the party secured, revived the liabilities of the sureties.

V. Though the order of dismissal might not have been fully effectual, as between the actual parties, to the appeal, because of having been made at Special instead of at General Term of the Court, it discharged the sureties. 1st. It was made on application of the party secured. 2nd. It betrayed nothing on its face to show irregularity, and was filed and made part of the records in the suit by the party who procured it, and so remained for the space of more than eight months, during which, execution was probably issued, and the remedy under the judgment exhausted against the principal. 3rd. Thus making it a part of such record was notice to all (including these sureties,) that the appeal was actually dismissed, and the sureties discharged; and (as against the sureties, who were strangers to the suit, and between whom and their prin-

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principal the law presumed equities,) estopped the party who got the order, and gave the notice, from ever after denying the validity of the discharge. 4th. To this day, as against these sureties, the record of the Marine Court is "appeal dismissed," and not "judgment affirmed," for no notice of the application to set aside the order of dismissal was ever served on the sureties, nor were they in any way parties to the proceedings to set aside such order. 5th. The proceedings to set aside the order of dismissal were a recognition of the fact of actual dismissal; and having been made part of the records of the Court effected new notice and additional estoppel.

VI. So long as the record of the Court stood "appeal dismissed," with nothing on the face of the record to impeach it, the plaintiff was in a position, by his own volition, in which he could not proceed against the principal; and was necessarily giving him time without consent of the sureties.

DAVIES, J.—This was an action upon an undertaking made and executed by the defendants to the plaintiff, bearing date December 31, 1855.

It recites that, on the 14th day of December of that year, in the Marine Court of the City of New York, the above-named plaintiff had recovered a judgment in that Court against the appellant therein named, for four hundred and eighty-nine dollars, and seventy cents, damages and costs; and that the said appellant, feeling aggrieved thereby, intends to appeal therefrom to the General Term of said Court. Thereupon the said defendants, pursuant to the statute in such case made and provided, undertook that the appellant would pay all costs and damages which might be awarded against him on said appeal, not exceeding the sum of two hundred and fifty dollars, and did also undertake that, if such judgment appealed from or any part thereof be affirmed, the said appellant would pay the amount directed to be paid by the said judgment, or the part of the amount as to which said judgment should be affirmed, if it should be affirmed only in part, and all damages which should be awarded against said appellant. The notice of appeal and undertaking were filed with the Clerk of the Marine Court, and a copy of both served on the plaintiff's attorney on the 31st day of December, 1855.

The plaintiff's counsel offered in evidence an order made by the Justice of that Court who tried the action, dated December 28, 1855, in these words: "Thomas Robert v. Ezekiel Donnell. On affidavit of the plaintiff, and on order to show cause, after hearing the respective parties, ordered that the defendant give security to pay the judgment in this action by or before twelve o'clock on the 31st instant, and serve notice that the security is given, with copy of the undertaking; the sufficiency of the sureties to be proved to the satisfaction of one of the Justices of this Court; and in default of the giving of such security, the stay of proceedings in this action, made in order of December 24, 1855, is from the time above stated vacated." The introduction of this order was objected to by the defendant's counsel, and the same was excluded, and the plaintiff excepted. On the 26th day of February, 1857, at a General Term of the Marine Court, the judgment appealed from was in all things affirmed. On the 10th of May, 1856, one of the Justices of said Marine Court, sitting alone, made an order that said appeal be dismissed, with costs, and that the stay of proceedings be vacated, which order he subsequently vacated on the 21st of February, 1857, and directed that the appeal be restored, the same as if the said order had not been made. The action was tried in the New York Common Pleas, and a motion was made by the defendant's counsel to nonsuit the plaintiff or dismiss his complaint, on the following grounds:

First. That the undertaking was void, it being without consideration, and as not authorized by any statute.

Second. On the ground that the appeal had been dismissed by Justice McCarthy, and that, therefore, no cause of action was proved.

The Court sustained the motion, and ordered the complaint to be dismissed, to which decision and ruling the plaintiff's counsel excepted. Judgment was affirmed at General Term.

The undertaking in this action was given upon an appeal taken from a judgment rendered by a single Justice of the Marine Court to the General Term of such Court, and such an appeal was distinctly authorized by the provisions of section 5 of an Act in relation to the Marine Court, passed July 1, 1853 (Laws of 1853, chapter 617,) which section declares that "an appeal may be taken from a judgment entered by a

single Justice of the said Court to the Justices thereof at a General Term, in the same manner and with the like effect as appeals in the Supreme Court from the decision of a single Judge to the General Term." Upon the proper construction of this provision, the validity of the undertaking and the plaintiff's right of recovery depend. The Code indicates and prescribes the manner of appeal from the Special to the General Term of the Supreme Court and the effect of such appeals, and we must look at these provisions to ascertain the meaning and intent of the Legislature in making them applicable to appeals in the Marine Court. Section 327 of the Code declares that an appeal must be made by the service of a notice in writing on the adverse party and on the clerk with whom the judgment or order appealed from is entered, stating the appeal to be from the same, or to some specified part thereof. Section 332 requires the appeal to be taken within thirty days after written notice of the judgment or order shall have been given to the party appealing. Sections 329 and 330 declare the effects of the appeal as to what the appellant may do upon such appeal. Nothing has been said thus as to any security or stay of proceedings upon any appeal, and if nothing more had been provided for, the party appealing would in most cases have derived little if any benefit from his appeal. The opposite party would have been at liberty to enforce his judgment, and the principal benefits anticipated from appeals, according to judicial observation, that of delay, would have been entirely frustrated. The 348th section of the Code enacts that no appeal from the judgment of a single Judge in the Supreme, Superior Court of New York, or Court of Common Pleas of said city, shall operate as a stay of proceedings, unless security be given as upon an appeal to the Court of Appeals, as required by section 335 of the Code. A reference to that section shows that if the appeal be from a judgment directing the payment of money, it shall not stay the execution of the judgment unless a written undertaking be executed on the part of the appellant by at least two sureties, to the effect that if the judgment appealed from, or any part thereof, be affirmed, the appellant, will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all dama-

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ges which shall be awarded against the appellant upon the appeal. It will be seen upon the comparison of the provisions of this section, with the undertaking upon which this action is brought, that it conforms in all respects with the directions of this section.

The only question remaining is, whether these sections of the Code, in reference to appeals in the Supreme Court have been made applicable to the appeals authorized to the Marine Court. The broad language of the Act of 1853 would seem to have been adequate to remove all doubt or questions upon this subject. The appeals authorized were to be taken in the same manner and with the like effect as appeals in the Supreme Court. It is manifest, the Legislature intended to confer upon the party appealing all the benefits and advantages which were given to the party appealing in the Supreme Court. His appeal was to be taken in the same manner. That is, when it was simply an appeal, and no stay desired by the service of the notices required, and when a stay was wished for, then, in addition, the execution and filing and service of a copy of the required undertaking. When these things be done, or either of them, then the appeal was to have the like effect as if the same had been taken in the Supreme Court. But we are not without authority on this point, this Court having passed upon this question, in the case of the *People v. Clerk of Marine Court*, reported in 3 *Abbotts' Pr.*, 309. Judge Mitchell, in the opinion of the Court delivered in this case, says: "The manner relates to the mode of proceeding in effecting an appeal, the notice and security to be given; the effect relates to the consequences produced by the appeal, as under what circumstances it shall operate to stay proceedings. 'Effect' is an appropriate word to describe a result that follows after the thing previously spoken of (the appeal) is completed, and would be quite inappropriate if used to define the cases in which such thing might be done."

The undertaking in suit was fully authorized by law, and is in due form, and the defendants' liability upon it cannot be questioned. That liability was not discharged by the order made by a single Justice of the Marine Court, dismissing the appeal. After the appeal was perfected, the cause was pend-

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ing before the appellate tribunal, and it, only, was authorized to entertain a motion for a dismissal.

The Justice properly vacated his own order, dismissing the appeal as unauthorized and of no effect.

The order made, requiring the security to be given, should have been admitted in evidence as part of the records of the Marine Court, and as a proceeding in the action. It was not, however, material, and would not of itself afford sufficient ground for a reversal.

But for the reasons stated, the judgment should be reversed, and a new trial ordered, costs to abide the event.

DAVIES, J.—At the close of plaintiff's case the defendants' counsel moved for a nonsuit, on the following grounds:

First. That the undertaking was void as being without consideration, and as not authorized by any statute.

Second. That the appeal had been dismissed by Justice McCarthy, and that, therefore, no cause of action was proved.

The Court granted the motion, and dismissed the complaint, and plaintiff's counsel duly excepted. Several technical questions were raised by the respondents' points, not suggested at the trial, and they are not to be considered here.

Justice McCarthy had no power, sitting alone as Judge, to dismiss the appeal. His order to that effect was inoperative, and might have been disregarded.

It was properly vacated by himself at a subsequent period. The important question of the case is, whether, upon an appeal from a judgment entered by the direction of a single Justice of the Marine Court to the Justices thereof at a General Term, security may be given by the appellant, which will operate as a stay of proceedings, according to the provisions of the Code,

This question depends upon the construction to be given to the fifth section, chapter 617 of the Act of 1853 (Sess. Laws, 1853, page 1166,) which is in these words:

"An appeal may be taken upon the same from a judgment entered by a single Justice of said Court to the Justices thereof at General Term, in the same manner and with the like effect as appeals in the Supreme Court from the decision of a single Judge to the General Term."

Section 348 of the Code of Procedure authorizes the appeal

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to the Supreme Court, referred to in the foregoing provisions, and declares that such an appeal does not stay the proceedings unless security be given as upon an appeal to the Court of Appeals, and such security be renewed as in cases required by section 335 on motion to the Court at Special Term, or, unless the Court or Judge thereof so order, which order may be made upon such security or otherwise, as may be just, such security not to exceed the amount required on an appeal to the Court of Appeals.

The manner of making the appeal is prescribed by section 327. The time within which it is to be done by section 332, and sections 329 and 330, declare the power of the appellate Court, in reviewing the judgment, and any intermediate order involving the merits and affecting the judgment.

The principal effect of the appeal taken in the manner indicated, is undoubtedly to bring the judgment for review before the appellate tribunal, where it may be reversed, affirmed or modified; but there is another effect which flows from the appeal, to wit: a stay of all proceedings on the judgment appealed from, provided the appellant complies with the requirements by giving the security or obtaining the special order which makes that effect operative.

This latter effect of an appeal is optional with the appellant, but when he chooses to comply with the requirements that produce it, the stay of proceedings in the Court below is as much an effect of the appeal as is the bringing up of the judgment for review.

In using the general language of the section relating to appeals in the Marine Court, above quoted, the Legislature intended to adopt the practice, on the subject of such appeals in the Supreme Court, as laid down in the Code with all its concomitants and incidents. It was not thought necessary to repeat the provisions of the Code, but the declaration, that the appeal should be taken in the same manner and with the like effect as appeals in the Supreme Court from the decisions of a single Judge to the General Term, was designed to be equivalent to such a repetition. Hence, I think quite clear that on an appeal, in the Marine Court, the appellant is at liberty to stay all proceedings on the judgment appealed from by giving security upon an appeal to the Court of Appeals.

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In *The People v. Clerk of the Marine Court*, (5 *Abb. Pr.*, 320,) this Court incidentally considered this question, though it was not directly involved. Mitchell, J., said: "The manner relates to the mode of proceeding in effecting an appeal, the notice and security to be given; the effect relates to the consequences produced by the appeal, as under what circumstances it shall operate as a stay of proceedings."

But, without considering the subject further, I think the Court below erred in not adopting the dissenting opinion of Brady, J., as a correct exposition of the law on this point. It follows that the undertaking, on which this action is brought, was authorized by the statute, and, if properly executed, operated as a stay, and, therefore, was based upon sufficient legal consideration.

The judgment should be reversed and a new trial granted, with costs to abide event.

REDFIELD *against* MIDDLETON.

New York Superior Court ; General Term, June, 1863.

PLEADING.—CAUSE OF ACTION FOR ACCOUNTING.

Where the complaint alleged that the plaintiff and defendant had made an oral agreement to carry on the business of publishing books, to which the plaintiff was to contribute contracts with authors, &c., and was to give his personal attention for several years at a salary, and afterwards to have an interest in the business, and further alleged that under such agreement the defendant had become possessed of the stereotype plates of certain books, the right to publish which, upon terms set forth in the complaint, was contributed by the plaintiff; but that the defendant refused to perform the agreement or to form the business connection contemplated, although the plaintiff had been at all times ready and willing, and had offered to perform; and that the defendant was proceeding to publish such books in his own name, denying that the plaintiff had any interest therein, and refusing to surrender the plates and books, though the plaintiff had de-

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manded them, and offered to indemnify him ;—*Held*, that these facts were sufficient to constitute a cause of action for a surrender of the books and plates, and an accounting.

The former decision in this case (*REDFIELD v. MIDDLETON*, 7 *Bosw.*, 649) distinguished.

APPEAL from an order overruling a demurrer to the amended complaint in this action.

A former decision upon the original complaint is reported in 7 *Bosw.*, 649. The plaintiff subsequently served an amended complaint, the allegations of which are sufficiently stated in the opinions.

The cause was heard upon the demurrer, before Mr. Justice WHITE, at a special term in December, 1862, who sustained the complaint, delivering the following opinion :

WHITE, J.—The defendant demurs to the amended complaint in this action, on the ground that it does not set forth facts sufficient to constitute a cause of action.

All the statements of the complaint are to be taken as true, and they are in substance these :

The plaintiff had formerly carried on the business of publishing, and had mortgaged his stock and material in that business to Bangs Brothers & Co., who took possession of it under the mortgage, and placed it in the hands of a trustee for sale. During this condition of things, the defendant and plaintiff made an oral agreement in January, 1860, by the terms of which the defendant was to carry on the business of publishing as successor of the plaintiff, so soon as he (defendant) could purchase said stock and material. The plaintiff was to contribute to the business his contracts with authors, his influence with them and others, his experience and knowledge as a publisher, and the good-will generally of the business formerly carried on by him. He was also to give his time and personal attendance to the business ; and for this he was to receive a salary, the amount of which was to be determined at a future time ; and on January 1, 1864, he or his appointee was to receive from the defendant, and become absolute owner of, one-half of the then business, with its accumulated stock and assets of every kind, subject, however, to one-half of the then liabilities of the concern.

From January to June, 1860, the plaintiff received from

England, from R. C. Trench, advance sheets of two of his (Trench's) works, for the purpose of having an American edition of each issued simultaneously with the British publication, and under an agreement between the plaintiff and Trench that the plaintiff should stereotype and publish the work, and that Trench should receive ten per cent. of the retail price of the books, and that the plaintiff have all the remainder, with the stereotype plates. The plaintiff ordered the stereotype plates to be made in his (the plaintiff's) name and upon his own credit.

About the time when the stereotype plates were completed, the defendant effected the purchase of the old stock and material formerly belonging to the plaintiff, and entered upon the publishing business as successor of the plaintiff; and the plaintiff thereupon, in pursuance of and relying upon the good faith of the defendant and the agreement between them, permitted the defendant to take a bill of sale of the stereotype plates from the founder, and to give his note to the founder for their cost, being \$445.

The defendant immediately caused an edition of each work to be printed, and advertised them for publication by himself, as successor of the plaintiff. The plaintiff then requested the defendant to have the oral agreement between them reduced to writing; but he refused to do so, and repudiated the agreement in all its parts, stating that he would not fulfil any stipulation of it, except that relating to the payment of a salary to the plaintiff; and denied that the plaintiff or Trench had any right, title, or interest in or to said plates, or editions, or the profits thereof. The share of the business and its assets which the plaintiff was to have in January, 1864, was to him the most valuable of the consideration of said agreement. The plaintiff could and would have paid for the stereotype plates when they were completed if it had not been for his confidence in the defendant's good faith, and his reliance upon the agreement between them.

The plaintiff, upon this repudiation by the defendant of their contract, obtained possession of the defendant's note given by him for the plates, and tendered it to the defendant, and also offered to reimburse him all the expenses he had incurred about said stereotype plates and the printing of said works, and offered

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to indemnify him fully against any liabilities he had incurred in the business ; and he demanded from the defendant the advance sheets and plates and the printed books. With this demand the defendant refused to comply.

The plaintiff now brings this suit, and asks judgment that the defendant be required to deliver the plates and books to him, upon his reimbursing the defendant all his expenses, and fully indemnifying him against all liabilities upon account of said plates or works. He asks, also, for an account of any sales made of the books, and that the proceeds be paid over to him by the defendant ; he also alleges that the defendant has little or no property, and is pecuniarily irresponsible, and that the works referred to are valuable, and will find a ready and profitable sale ; and he further avers that he has tendered performance, and is ready, fully, to perform the contract upon his part.

I think these facts constitute a sufficient cause of action. They allege, in effect, that the defendant, an insolvent, under the pretext of forming a regular permanent business connection with the plaintiff, of considerable value to the plaintiff, obtained from him, as part of his contribution to the proposed joint undertaking, the privilege of advance sheets, and means of publishing, two works of much profit to the publisher ; and having obtained them, he published the works and refused to form the connection, or *quasi* partnership, upon the promise of forming which, he obtained from plaintiff, the property and interests in question. This is so fraudulent upon its face, that so long as the property wrongfully acquired existed, and was in its nature capable of recaption and delivery, I can see no reason why it could not be forthwith retaken by the plaintiff in an action of replevin.

But as the property or rights acquired by the defendant in this case have undergone a change in their conditions, or been incorporated with other rights or interests, since the plaintiff parted with their control, the present application to the equitable powers of the court is the proper form of proceeding, and the plaintiff should have all the relief which the power of the court can give.

The fact that the contract was not in writing, and therefore void, as being within the Statute of Frauds, does not apply

here; because the action is not brought to enforce the performance of any contract, but simply upon the averment that the defendant, under a false promise, or pretence, that he would make a certain contract with the plaintiff, obtained the plaintiff's property; and now, while refusing to, and declaring that he will not fulfil that false promise, fraudulently retains and uses the property and interests which he had acquired by means of making it, and refuses to return it, or to account respecting it, although requested to do so by the plaintiff.

The suggestion, that the plaintiff should not sue the defendant until January, 1864, but should continue to serve him in the mean while, and allow him to enjoy the interest which the plaintiff had contributed to the business, and take the risk of a recovery against him at that time for his breach of contract, is neither sound nor reasonable. The plaintiff could be no more bound to go on and give his time, and services, and means, to the defendant for four years, when the defendant notified him beforehand, that he, defendant, would only pay him half price, or no price at all, for such time, and services, and means, than a merchant would be bound to continue to deliver merchandise upon a contract running for four years, to an insolvent man, who, upon the receipt of the first parcel, should refuse to pay for it, and should declare that he never would pay any thing, or, at best, but a very small fraction of the value or contract price, of whatever the merchant might thereafter deliver to him. Such a frank, freebooting purchase would receive but slight comfort or encouragement from any court of justice, whose process the despoiled merchant might demand for the recovery, in specie, of the first parcel which his unprofitable customer had succeeded in fraudulently extracting from him.

I take this view of the case only upon the assumption, which a demurrer always requires, that all the material allegations of the pleading demurred to, are true.

Upon an answer taking issue upon those allegations, the case may prove to be a very different one.

But as it stands upon the demurrer, I must order judgment for the plaintiff, with costs; but with liberty to the defendant to answer in ten days after notice of the order to be entered upon this decision, upon payment of the costs of the demurrer to be taxed.

From the order entered on this decision, the defendant now appealed.

F. N. Bangs, for the defendant, appellant.

R. Wynkoop, for the plaintiff, respondent.—I. The oral agreement was void under the statute ; because, by its terms, it was not to be performed within one year from the making thereof. But this is not an action to compel performance, nor is this an action for damages for breach of that agreement.

II. The agreement being void (unless reduced to writing, and defendant refusing this), there would be no force in the suggestion, that plaintiff should have waited till January 1, 1864. He could not then enforce specific performance, nor recover damages for breach of contract.

III. This is an action to recover property (or its proceeds), which has been obtained by defendant from plaintiff by false pretences, without consideration, and by a promise which defendant now repudiates, and which cannot be enforced.

IV. An injunction and a receiver were asked for, and should have been granted ; because the defendant was irresponsible, and the plaintiff's rights were in peril.

V. The advance sheets were valuable only because of their exclusiveness. That value passed to the stereotype plates, and thence to the books printed therefrom. Defendant possessed himself of that value by fraud. By means of his promise to enter into business with plaintiff, he induced plaintiff to allow him possession of the plates ; having obtained possession, he repudiated his promise.

VI. The plaintiff has been ever willing, ready, and able to perform his part of such oral agreement.

VII. Plaintiff's demand of possession was sufficient.

VIII. Plaintiff is now entitled to judgment, that the defendant account, and that he pay over to plaintiff all the proceeds of sales of said books, over and above the actual cost of the manufacture of the same, and of the stereotype plates ; and that he deliver to plaintiff possession of said plates, and the unsold books and sheets ; and to further judgment, that plaintiff is entitled to injunction and receivership.

By THE COURT.*—BOSWORTH, CH. J.—According to the allegations in the complaint, all of which the defendant, by demurring, admits to be true, the plaintiff and defendant agreed, orally, in January, 1860, that the defendant should enter upon a designated business as soon as he could effect a specified purchase; that the plaintiff was to make certain contributions to such business, and give to it his time and personal attendance. The defendant was to pay him a salary, the amount of which was to be fixed subsequently, to commence at the time of such purchase; and on the first of January, 1864, the plaintiff was to have one-half of the business in its then condition, subject to one-half of its then liabilities.

That in January and June, 1860, the plaintiff received from R. C. Trench the advance sheets of two works to be stereotyped and published, said Trench to have ten per cent. of the retail price of the books, and the remainder of the profits and the plates were to belong to the plaintiff. The plaintiff ordered the stereotype plates made, and relying upon his agreement with and the good faith of the defendant, allowed a bill of sale of the plates to be made to defendant for their price, \$450, for which the defendant gave his note.

That the defendant effected the purchase first mentioned, about this time, and although the plaintiff demanded it, the defendant refused, and still refuses to reduce the oral agreement to a written one, and alleges his right and intention to carry on the business for his own exclusive profit; that he has not only refused to sign a written agreement like the oral one, but “declared that he would not be bound by such agreement; that he would not form such a business connection with plaintiff.”

That the plaintiff has at all times been ready and willing, and has offered to perform his part of said agreement, and to have the same reduced to writing and signed by the parties.

That the defendant caused an edition of said works to be printed in his own name, and has advertised them for publication by himself, as successor of J. S. Redfield, and denies that the plaintiff, or Trench, has any right, title, or interest in said plates, editions, or the profits arising therefrom.

* Present, BOSWORTH, CH. J., MONCRIEF and WHITE, JJ.

That the plaintiff has offered to surrender to defendant the note he gave for the plates, and to indemnify him against loss or any expense in the premises, and has demanded of him the plates, and the sheets, and books manufactured therefrom, which the defendant refuses to surrender; that said works are valuable and salable; that defendant is a man of little or no property, and a judgment in damages against him would not be of any value, as plaintiff believes.

It prays that defendant be adjudged to surrender to the plaintiff "said plates, sheets, and books, and to account for and pay to plaintiff the proceeds of sales thereof, if any such shall have been made, upon such terms as the court may adjudge," and also for an injunction and receiver, *pendente lite*.

I think the complaint is rather inartificial. But it alleges, in substance, that the defendant is possessed of certain property of the plaintiff, which came to his possession as part of plaintiff's contribution to a business, which he agreed to prosecute for the common benefit of the two, but which business he now refuses to prosecute in connection with the plaintiff, or otherwise than for his own sole and exclusive benefit.

The whole consideration for the transfer has failed, and that, too, by the wrongful conduct of the defendant, and without fault on the part of the plaintiff. An action in damages would, presumptively be of no value, and the plaintiff's damages are not susceptible of computation, and the property should be restored to him, on such terms as may be just.

The complaint is now quite different from the one before us in this case on the appeal reported in 7 *Bosw.*, 649, as Redfield *a. Middleton*.

That did not allege that the plaintiff had offered to perform the oral contract on his part (*Ib.*, 652). That did not allege that the defendant declared "he would not form such a business connection with the plaintiff," as he had agreed to do (*Ib.*, 654).

The present complaint shows the extent of Trench's interest, and also of the plaintiff's interest, under the contract between them, on the advance sheets and sales of copies of the works.

The present complaint shows, though not as clearly as more formal averments would express it, that the plaintiff has offered to perform all things on his part, and that the defendant

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refuses to have the business connection with the plaintiff agreed upon. The agreement would be void by the Statute of Frauds, and the defendant has given formal notice that he will not be bound by it, or act under it, or permit any thing he may do, to be deemed done under or in part execution of it.

I think the complaint states a cause of action, and that the order appealed from should be affirmed.

TILMAN *against* KEANE.

Supreme Court, First District; Special Term, October, 1865.

REFEREE'S REPORT.—COSTS.—OFFER TO ALLOW JUDGMENT.

The report of a referee must contain his findings of fact, and conclusions of law, and no judgment should be entered upon the report before these are filed.

Where the amount of an offer, under § 385 of the Code, exceeds, with interest to the date of the judgment, the judgment actually recovered, the latter, though larger than the actual offer, is not "a more favorable judgment" within the meaning of that section, and does not carry costs.

The referee has nothing to do with the question of costs in an action on a money demand on contract.

I. Motion for an order requiring the referee to make a further report.

This action was brought by Leopold Tilman against Maria J. Keane, for a money demand on contract. It was commenced December 1, 1862. The plaintiff, in his summons and complaint, demanded judgment for \$1,741 11, with interest from 1st September, 1862. On the 13th December, 1862, the defendant appeared in the action, and served an offer to allow judgment to be entered against her for \$984 94, with interest from September 1st, 1862, besides costs, under section 385 of the Code. The offer not having been accepted, the defendant answered, and the cause was noticed for trial.

When it was reached at the circuit, November 17, 1863, it was referred by the court, on the ground that the trial would require the examination of a long account, and the trial before the referee was commenced a few days later.

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On the 26th of July, 1865, the referee made his report in favor of the plaintiff for \$1,083 90, and costs of the action.

A copy of the report, which was general, and in the form used before the adoption of the Code, was served on the defendant's attorneys, and was accompanied with a bill of the plaintiff's costs, and the usual notice of adjustment. On an affidavit stating these facts, the defendant obtained a stay of proceedings, and moved for an order requiring the referee to make a further report.

J. S. Carpentier, for the motion.—I. The report is defective, because it does not "state the facts found, and the conclusions of law, separately," as required by section 272 of the Code, and by the 32d rule of the Supreme Court, (*Roberts v. Carter*, 28 *Barb.*, 462.)

II. The Court should order a further report. (*Snook v. Fries*, 19 *Barb.*, 313; *Parsons v. Snyder*, 3 *E. D. Smith*, 276; *Church v. Erben*, 4 *Sandf.* 691.)

III. If, for any reason, effect could not be given to the order, the court should set aside the report altogether. (*Peck v. Yorks*, 14 *How. Pr.*, 416.)

John O. Robinson, opposed.—The report is in full compliance with the law, and no special report can be required, except where the party appeals; when he must make a case, to be settled by the referee, in which the facts found and the conclusions of law should be stated. (*Johnson v. 3 Whitlock*, 13 *N. Y.* [3 *Kern.*,] 344.) This last case virtually abrogates the 32d rule of this court.

Carpentier, in reply.—A decision of the Court of Appeals is of no binding force in mere matters of practice in this court, and cannot control the operation of its positive rules. Much less is it to be controlled by the mere opinion or dictum of one of the judges of that court.

INGRAHAM, P. J.—The referee should state the findings of fact and conclusion of law in his report. It would deprive the party of his right to except, if the judgment was to be entered before the findings of the referee are made public. The law requires him to except within ten days after judgment is en-

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tered notice served. If the findings are not inserted in the report, and judgment is entered without them, the plaintiff might, by giving notice of the judgment and delaying the action of the referee, deprive the other party of their power of excepting within the ten days. (28 *Barb.*, 462.) The 32d rule requires the finding to be in the decision.

At any rate, no injury can arise from requiring the referee now to make a special report.

Motion granted ; costs to abide the event.

II. Appeal from taxation of costs.

The plaintiff presented to the clerk a full bill of costs, amounting to over \$400, which he claimed to have adjusted and included in the judgment. The defendant produced a copy of the offer of judgment with proof of service, and showed, by computation, that the amount offered, with interest added to July 26, 1865, the date of the report, would be \$1,185.26, being an excess of \$101.36 over the sum reported, and claimed that the plaintiff was only entitled to costs up to the time of the offer. It was also claimed that the defendant was entitled to costs of the action, subsequent to the offer.

The clerk refused to adjust the defendant's costs, but adjusted those of the plaintiff at the full amount claimed, alleging that he was bound by the report of the referee, who had reported in favor of the plaintiff, with costs of the action. The defendant appealed from the taxation of plaintiff's costs, and, on an affidavit showing the above facts, moved for an order directing the clerk to adjust the defendant's costs subsequent to the offer, and to cause the proper entries awarding those costs to be inserted in the judgment roll.

J. S. Carpentier, for the motion.—The plaintiff, having “failed to recover a more favorable judgment” than that offered by the defendant, is not only barred of his costs subsequent to the offer, “but must pay the defendant's costs from the time of the offer.” (Code, § 385 ; *Schneider v. Jacobi*, 1 *Duer*, 694 ; *Kilts v. Seeber*, 10 *How. Pr.*, 270 ; *Budd v. Jackson*, 26 *How. Pr.*, 398 ; *Burnett v. Westfall*, 15 *How. Pr.*, 420.)

John O. Robinson, opposed, produced the certificate of the referee that the offers of judgment had been submitted to him,

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and had been considered by him in awarding costs to the plaintiff; that the interest on the sum offered, \$984. 94, from the 1st Sept., 1862, to the date of the offer, Dec. 13, 1862, amounted to \$19.72, making the total \$1,004 66; and that, having reported \$1,083.90 due the plaintiff, he had also awarded costs to him.

An offer of judgment does not carry interest beyond the time of the offer, and is not, in that request, like a verdict or report of referees. (*Code*, § 310.) Having obtained a report for more than the offer amounted to, with interest to the date of the offer, the plaintiff has recovered a more favorable judgment, and is entitled to the costs of the action.

Mr. Carpentier, in reply.—The referee had nothing to do with the offer of judgment. It was not properly before him, and the plaintiff's counsel had no right to submit it to him, for any purpose. Not having been accepted as provided by the Code, it was deemed withdrawn. It could not thereafter be offered in evidence, and was only available, in the event of a claim by the defendant for costs. Besides, the referee's principle of computation was wrong. Had the plaintiff given notice of the acceptance of the offer, he might have entered judgment at any time. There is nothing in the statute requiring him to act upon it promptly, except to give notice of acceptance, any more than upon a verdict or a referee's report. He might have kept it in his desk until the 26th day of July, 1865, and then entered judgment for \$1,185.26, with costs to the time of the offer. He has forced the defendant to incur large expenses to resist an unjust claim, and it is but right he should pay them.

INGRAHAM, P. J.—On the 13th day of December, 1862, the defendant offered to allow the plaintiff to take judgment for \$984.94, with interest from 1st September, 1862. The plaintiff did not accept the offer, but went on with the action, and on the 26th July, 1865, obtained a report for \$1,083.90. If the plaintiff had accepted the defendant's offer, and entered up his judgment in December, 1862, for the amount offered, the judgment would have been entered, and the amount, in July, 1865, with interest added, would have exceeded \$1,150. It is very clear, therefore, that if the plaintiff had acted on the offer, he would have recovered more than he has now.

It is objected by the plaintiff that the offer does not carry

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interest until the judgment is entered up. Even conceding this to be so (which I do not admit), still the plaintiffs should have accepted the offer and entered up his judgment.

If he may let his action remain quiet, and does not proceed with it for a year or two, the whole object of the law would be defeated, by adding the interest to the claim, and thereby, making it larger than it was when the offer was made. Such was not the intent of the law. The true inquiry is, whether the amount recovered, deducting the interest, is more than the defendant admitted in his offer. The referee has nothing to do with the question of costs.

The motion must be granted.

Order accordingly.

HUELET *against* REYNS.

Supreme Court, First District ; Special Term, November, 1865.

ARREST.—REFERENCE OF MOTIONS. COUNTER-CLAIM TO DEMAND
FOR CONVERSION.

The practice of referring motions to vacate orders of arrest to referees, is objectionable. Such motions should be determined by the Judge, upon the affidavits presented.

In an action brought to recover the value of chattels of the plaintiff, converted by a defendant, it is not ground for discharging an order of arrest that the defendant has a claim for a larger amount against a plaintiff.

Where goods sold on credit have been delivered, a vendor should proceed by attachment if he would subject the goods to sale for payment of a price. Retaking possession without authority, and disposing of the goods, is a conversion; and in an action therefor, the indebtedness of the plaintiff to defendant, for the price, is no defence.

Huelet v. Reynolds.

Motion to confirm the report of a referee and discharge an order of arrest.

This action was brought by Mathilde Huelet against Guillaume Reynolds. The facts are stated in the opinion.

Spilthorn & Fogerty, for the motion.

Mr. Coudert, opposed.

INGRAHAM, P. J.—The defendant was arrested in this action, which according to the original affidavit, appears to be to recover the value of property belonging to the plaintiff, and which property the defendant got into his possession from the persons in whose charge the plaintiff placed it, without her authority, and which on demand he refused to deliver to her.

The defendant does not deny the plaintiff's title, but seeks to excuse the taking and to retain the property, on two grounds. 1st. That the plaintiff bought the property from him, and 2nd, that she did not pay for it, but is still indebted to him in a large amount therefor.

The motion sometime since was referred to a referee to report his opinion, and he has reported that the order of arrest should be vacated.

I am very much embarrassed in the decision of this motion by the course that has been taken in regard to the referee's report; that such references or motions are inexpedient, I cannot doubt. A large mass of evidence has been taken, but not in my judgment changing the state of facts as they appeared when the order of reference was made, and on this motion the case has been argued in every aspect. Exceptions have been taken to the report as though it was a report on an issue in the cause, as well as exceptions to the admission of testimony, and the decision of the referee is objected to as against the weight of evidence. All these things are inexpedient and improper on motions.

Each side should be allowed to present his case on ex parte affidavits of himself and of others, and it is for the Judge to decide what credit and weight he will give them, and on this account it is that such motions cannot with propriety be sent a reference.

The referee appears to have considered the case as depending on the question, whether the goods had been obtained by fraudulent representations ; and finds that they were not, and therefore that the order of arrest should be vacated.

I do not understand the defendant as denying that the plaintiff had the possession of the property, and placed it in the possession of other parties for her benefit, nor that the defendant procured the possession of it without her consent. I consider, for this motion, all the facts to be as found by the referee ; viz., that this property was in the hands of one Cornelis for the account of the plaintiff, that the plaintiff was largely indebted to the defendant, and in part for these goods or some of them, that they were brought here from Mexico on the plaintiff's account, that when defendant found the goods here, he was about to seize them by attachment, and Cornelis was induced to deliver the possession of them to the defendant, who sold them and claimed to justify his refusal to deliver them on the ground of the plaintiff's indebtedness to him.

Taking all these statements to be facts, it seems to me they show no defence to the action. I lay out of view sundry charges of improper intentions as to the dispositions of these goods by either party, whether they were sent from France to avoid creditors, or were to be improperly introduced into Mexico. All this is immaterial here. The delivery of the goods without payment or on credit, vested no title in the defendant. That could not be divested except by plaintiff's consent or by operation of law. The defendant's possession was by neither. The delivery to him by Cornelis, the agent of the plaintiff, was beyond his authority, and vested in defendant no title. In an action to recover the possession, his claims against the plaintiff or her husband for moneys due him would be no defence. If he wanted to hold the property to secure his debt he should have attached it. No creditor can, without his debtor's consent, obtain possession of property and hold it as security for the moneys due him. Nor can he offset such claims against a claim for the property.

These principles are well settled, and entirely dispose of this motion.

The plaintiff has demanded from the defendant her property, of which he has had possession, without her consent, and when

 Palmer's Petition.

demanded, he refused to deliver it, and says he has sold it. This amounts to a conversion, for which he is liable, and to which the defendant can set up no counter claim.

I see no ground on which a defence could be made out of these facts.

I have considered these questions on the merits as they would be disclosed on a trial, but it is proper to add that in cases where the cause of the arrest must be proved on the trial as part of the cause of action, it is not proper to try the question on a motion to discharge the defendant from arrest. If the plaintiff's affidavits are positive, the only proper question for discussion is the amount for which the defendant should be held to bail. On this point there is no dispute in the papers.

The motion must be denied.

met
 Oct. 4th 9^o at
 (inscribed)
 S. 203, 204.

 PALMER'S PETITION.

Supreme Court, First District; Special Term, June, 1865.

The objection that the assessors have assessed property for a local improvement in the city of New York more than is allowed by law, may be raised for the first time before the Supreme Court on a motion to vacate the assessment.

Where two members of the Board of Revision and Correction of Assessments meet and confirm an assessment, without the presence of or notice to the third, their proceedings are irregular; and the irregularity is not cured by a subsequent formal approval of the minutes by the third member of the Board nor by the Act of 1861.*

Motion to vacate an assessment on certain lots belonging to Courtland Palmer, the petitioner.

The petition in this matter asked for the vacation of an assessment on lots under water on 34th Street, between 11th and 12th Avenues, belonging to the petitioner, on the grounds,

* Compare Beekman's Petition, *Abbotts' Pr.*, 244.

Palmer's Petition.

first, that such lots being under water were not benefited by the sewer for the building of which the assessment was laid; second, that the assessment exceeded one-half of the value of the property, as fixed by the assessors of the ward, the valuation being \$100 per lot, while the assessment was \$142 upon each lot except the corner lot, which was assessed at \$193.12; and, third, that the assessment list was only presented to two of the board of Revision and Correction, the Recorder being absent at the time the assessment was acted on by the Comptroller and Corporation Counsel.

The affidavits showed, on this latter point, that on the 11th of July, 1861, when the assessment list was presented and confirmed, only the Comptroller and Counsel to the Corporation were present, but that on the 24th July, 1861, their next meeting, the Comptroller and Recorder being present, the minutes of the previous meeting were read and approved.

Anderson & Davies for the petitioner.

John E. Develin for the respondent.—I. Under the Act of 1861, chap. 308. § 1, declaring that an assessment if not confirmed within thirty days shall be deemed confirmed, all defects were cured.

II. The *presence* of the Recorder was not necessary. If he were notified and failed to appear, a majority could act, and in the absence of all negative testimony the Recorder must be presumed to have been notified (*Horton v. Garrison*, 23 *Barb.*, 176; *People v. Walker*, *Id.*, 304; *People on rel. McSpedon v. Supervisors*, 10 *Abb. Pr.*, 233; *Yates v. Russell*, 17 *Johns.*, 461; *People v. Carpenter*, 24 *N. Y.*, 86).

III. The other objections are not available to the petitioner. They are to matters in the judgment of the Commissioners, and can not be raised here unless they were taken before the Commissioners (16 *Johns.*, 281; 19 *Wend.*, 649; *Id.*, 657; *Id.*, 680; 15 *Wend.*, 374, 377; 28 *Barb.*, 609; 1 *Sandf.*, 283).

SUTHERLAND J.—I am clearly of the opinion, that the application must be granted on two of the grounds; 1st, that the assessments on 14 of the lots, greatly exceeded the amounts or sums authorized by the Act of May 14th, 1840; 2d, that the assessment list was presented to, and confirmed by only two members of the Board of Revision and Correction, under the Act of April 17th, 1861.

Dikeman v. Puckhafer.

As to the first of these grounds; the Act (May 14th, 1840, 557) expressly declares, that the commissioners or assessors, "shall in no case assess any house, lot, improved or unimproved lands, *more than one half the value of such house, lot, improved or unimproved land*, as valued by the assessors of the ward in which the same shall be situated."

The proofs conclusively show, that 14 of the lots were assessed nearly three times the amount allowed by this provision of the Statute.

As to the 2d of these grounds; the proofs conclusively show, that only two members of the Board met and acted; and I am of the opinion, that I have no right to presume that the third member of the Board, even had notice of the meeting.

I am also of the opinion, that the subsequent formal general approval, when the Recorder was present, of the minutes of the previous meeting, could not, and did not, cure or remedy this defect or irregularity. Nor in my opinion is this defect or irregularity cured or remedied by the provision of the Act of 1861, that assessment lists not confirmed within 30 days after presentation, shall be deemed confirmed; the Board or two of the members of the Board, in this case, having *in fact* undertaken to Act on, and to confirm the assessment list. Having so undertaken to act, and to actually confirm, the regularity of the confirmation must be tested by the regularity and force and effect of this action, and pretended actual confirmation.

My conclusion is, that the application to vacate the assessment must be granted.

DIKEMAN *against* PUCKHAFER.

New York Common Pleas; General Term, April, 1865.

CHATTEL MORTGAGE.—RECORDING.

A chattel mortgage which does not specify a time for payment is due immediately, and no demand for payment is necessary to sustain an action upon it.

It is the duty of the Register to index a chattel mortgage duly filed with him, and his omission to do so cannot prejudice the lien of a mortgagee who has done all required of him to make the mortgage valid.

Appeal from a judgment of a District Court.

The facts are fully stated in the opinion.

BY THE COURT—CARDOZO, J.—In January, 1863, the plaintiffs sold to Messrs. Boscomp & Schiffer a grocer's wagon, and took back a mortgage on it for the purchase money, viz: \$100. The mortgage did not specify any time for payment, and consequently was due immediately (*Howland v. Willett*, 3 *Sandf.*, 607), and it was not necessary to demand payment of it to enable the plaintiffs to maintain this action (*Howland v. Willett*, *supra*; *Brown v. Cook*, 3 *E. D. Smith*, 123).

The plaintiffs duly filed the mortgage in the Register's office, but the Register appears not to have properly indexed it according to the Act of 1849, and this omission, attributable probably to the difficulty of deciphering the names of the mortgagors, has led to the dispute between the parties and to this suit.

After the filing of the mortgage, the defendants purchased the wagon, with other property, from the mortgagors, paying for it by crediting them with the amount of an old indebtedness of \$172, paying on their account to one Hecker (who had a mortgage on this wagon) \$100, and also paying to the mortgagors the sum of \$40 in cash. The defendants, before making the purchase, examined the index of chattel mortgages in the Register's office, but, by reason of the omission of the Register, they failed to discover, and they had not any notice in fact of the existence of the mortgage. The plaintiff demanded this wagon from the defendants, but they refused to surrender it, and claim to hold it discharged of the lien of the mortgage to the plaintiffs. A demand before suit brought is distinctly and positively sworn to by the plaintiff Seabold, and therefore, while I incline to think that a demand after the summons had issued would not be sufficient, it is unnecessary to determine that point.

The jury found for the defendants. I think the verdict contrary to law.

Upon the evidence, the plaintiffs had done all they were re-

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quired to do to make the mortgage to them valid. A duty, viz., to index the mortgage, rested on the Register, with which the plaintiffs had nothing to do, over which they had no control, and the omission of which was not their fault. They were bound to file the mortgage, and they did so. That the defendants did not, through the registry, obtain notice of this mortgage was not the plaintiff's fault, and cannot affect their rights (see *Dodge v. Potter*, 18 *Barb.*, 193).

The mortgage was given for a valid and valuable consideration, the *bona fides* of it was not attempted to be impeached; it was filed pursuant to the statute, and the defendants, if they have been misled into parting with their money for the wagon in ignorance of the plaintiff's lien, must seek redress against the officer whose omission to do his duty has operated to their loss. They cannot claim to hold the property free of the mortgage.

The judgment should be reversed.

DE FOREST *against* BAKER.

New York Superior Court; General Term, November, 1863.

COMPLAINT UPON UNDERTAKING.—ALLEGATION OF DISSOLUTION
OF INJUNCTION.—JUDGMENT AFTER ANSWER STRUCK OUT.

In an action upon an undertaking which was given upon issuing an injunction, and was conditioned to pay all damages sustained thereby "if the Court shall finally decide that the plaintiff (in the injunction suit) was not entitled thereto," if the complaint avers that judgment has been rendered in the injunction suit, in favor of the defendants, but does not disclose the ground of the judgment, nor aver in terms that the Court has decided that the plaintiff therein was not entitled to the injunction, an answer merely denying that it has been so decided, and that the present plaintiff has been damaged, and that defendant is indebted to him, is not irrelevant, but raises a material issue.

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Nor is it shown to be sham, by an affidavit stating that the complaint in the injunction suit was dismissed, but not disclosing on what ground.

When an answer is struck out as sham and irrelevant, the proper method of obtaining judgment is proceed as if no answer had been put in. If the summons be for relief, the defendant is entitled to the usual notice of application for judgment, after the answer has been stricken out.

APPEAL by the defendant Baker, from an order striking out his answer in the action, and giving judgment.

The action was brought by BENJAMIN DEFOREST and CHARLES L. ROWAN, against ALEXANDER STRONG and CHARLES W. BAKER, to recover on an undertaking given by the defendants, upon the issuing of an injunction against the plaintiffs, in an action previously brought against the latter in the Supreme Court, by one Robert Strong.

The complaint in the present action averred the commencement of the injunction suit, and the giving of the undertaking, which was in the usual form.

The other allegations of the complaint which were drawn in question, and those of the answer, are stated in the opinion of the Court. The complaint demanded judgment for five hundred and seventy dollars, the amount awarded as damages by a reference in the usual manner in the Supreme Court.

The plaintiffs moved to strike out this answer as sham and irrelevant, and for judgment. The motion was founded on the pleadings and on an affidavit by Samuel Brown, their attorney, stating that the complaint in the injunction suit "was dismissed, and judgment thereupon entered in favor of the plaintiffs, against said Robert Strong, as referred to in the complaint in this action." It also set forth the proceedings upon the reference and the order confirming the award, and allowing the present plaintiffs to sue therefor. Among the papers produced also were papers in an appeal from such order in the Supreme Court, and an undertaking given thereon to secure a stay of proceedings on the order.

The motion from which the present appeal was taken was heard before Mr. Justice Moncrief at Special Term, who granted it, July 1, 1863.

M. J. Bacon, for defendant appellant.

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I. The appeal (with undertaking) from the order of the Supreme Court, stopped all proceedings under that order (*Code*, § 342).

II. The answer was a good and sufficient defence, and should not have been struck out as frivolous, because on its face it was not taken merely for delay (2 *Abb. Pr.*, 414; 12 *How. P.*, 543).

II. Upon its face, and in fact and law, the answer is a perfect and complete defence, especially as it was accompanied with an affidavit of merits. Unless apparent that it was not interposed in good faith (2 *Sandf.*, 680).

Samuel Brown, for plaintiff respondent.

The only question before the Court at Special Term was the character of the answer interposed on behalf of defendant Baker.

There was no evidence before the Court that an appeal had been taken from the order made by the Supreme Court, or that the proceedings in that Court had been stayed by security or otherwise; or that any stay had been applied for, or granted in this Court, and the fact was otherwise.

I. The answer does not take issue upon any material allegation on the complaint.

The defendant on the hearing of the motion did not deny that the complaint in the original action had been dismissed, and that judgment had been rendered and entered for defendant as alleged in the complaint.

Nor does the answer deny that by an order of the Supreme Court made in pursuance of the terms of the undertaking the damages of plaintiff were assessed at five hundred and seventy dollars.

II. The second allegation of defendants' answer is evasive and irrelevant and false. The dismissal of plaintiff's complaint, and rendition and entry of judgment for defendant as set forth in the complaint, was the final decision referred to in the undertaking, and was conclusive evidence on this point (*Loomis v. Brown*, 16 *Barb.*, 325; *Weeks v. Southwick*, 12 *How. Pr.*, 170; *Mutual Safety Insurance Company v. Roberts*, 4 *Sandf. C. R.*, 592; *Hoyt v. Carter*, 7 *How. Pr.*, 140); the defendant subsequently submitting to a reference was also evidence of the final determination of the argued action.

III. The defendant's denial that plaintiff had suffered any damage, was also false in fact. Because defendant admits that the damages were assessed by the Court in a proceeding in which they opposed his motion and litigated the question of damage.

IV. The extent of defendant's liability was fixed by the proceedings in the Supreme Court, and in this action they would only be allowed to plead new defences to their liability on the undertaking (*Methodist Churches v. Barker*, 18 *N. Y.*, 463; *Wilde v. Joel*, 15 *How. Pr.*, 320.)

V. The defendant's answer was sham and irrelevant, and the order should be affirmed with costs (*Lee Bank v. Kitching*, 7 *Bosw.*, 664; *Edgerton v. Smith*, 3 *Duer*, 614; *Kurtz v. McGuire*, 5 *Duer*, 660; *The People v. McCumber*, 18 *N. Y.*, 315.)

BY THE COURT.*—BOSWORTH, CH. J.—The complaint avers that judgment has been rendered in the injunction suit in favor of the defendants therein, and the judgment roll filed, &c., "whereby it appears that said Robert Strong (the plaintiff in the injunction suit) was not entitled to said injunction."

The answer alleges, *second*, that the defendant, "denies that it has been decided that said Robert Strong in said complaint mentioned was not entitled to the injunction in said action." If it was not in fact so decided, or if the judgment rendered does not import that, in legal effect, then the defendants are not liable.

It is not stated, in what manner, or on what grounds the judgment was rendered, nor is it stated that the Court decided that Strong was not entitled to the injunction, unless such a statement is involved in the allegation, "whereby it appears that said Robert Strong was not entitled to said injunction."

If the judgment was rendered on a trial of the action on the merits of the case made by the complaint, or on a dismissal of the complaint for want of prosecution, then the injunction would be dissolved by the judgment rendered, and the judgment would be a final determination of the rights of the parties in that action (*Code of Pro.*, § 245; *Carpenter v. Wright*, 4 *Bosw.*, 655).

* Present, BOSWORTH, CH. J., WHITE and MONELL, JJ.

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But judgment may have been given for the defendants in that suit, solely by reason of matters of defence arising after suit brought, and on grounds conceding that the injunction was rightly issued.

Whether the plaintiff means by the words, "whereby it appears that said Robert Strong was not entitled to said injunction," that such a result is manifested by the mere fact that judgment was given for the defendants, irrespective of the grounds of the judgment; or that the record discloses that the Court so adjudged, it is not easy to determine. I think, however, that he does not mean to allege in the use of those words, that the Court has in terms so decided. It is certainly not averred in terms, that the Court did so decide: the answer, substituting "says" for "denies," would contain a direct and unequivocal averment that the Court has not so decided. And this is broad enough to exclude the fact of a decision to that effect, either in terms or legal effect.

This is not an irrelevant allegation, nor is it sham in the sense that it is shown to be untrue. Not being irrelevant, nor shown to be untrue, it cannot be stricken out on motion.

The affidavit of Mr. Brown the plaintiff's attorney, states that the complaint in the injunction suit was dismissed; but does not say whether it was for want of prosecution, or on what ground.

The defendant's counsel insisted on the argument that it was dismissed for want of prosecution, and his view is that a judgment for the defendants on that ground is not a final decision that the plaintiff was not entitled to the injunction, within the meaning of the undertaking.

In that I think he is mistaken (*Code*, § 245; 4 *Bosw.*, 655). If his answer be stricken out as sham, he cannot test the accuracy of his views. It is not sham, if his view of the law is correct, and the judgment proceeded on the grounds stated.

But inasmuch as the complaint does not show on what grounds the judgment was rendered; and the answer avers in substance that it has not been decided that Strong was not entitled to the injunction; the latter averment presents an issue, on the decision of which the question of the defendant's liability depends.

And as the pleadings present this question, it cannot be said that the allegation, denying the defendant's indebtedness, or

that the plaintiffs have sustained damages within the meaning of the undertaking, is false or irrelevant.

If it has not been finally decided in the injunction suit that Strong was not entitled to the injunction, within the meaning of the words, "finally decide," as used in the Code and the undertaking, then it follows that these plaintiffs have not in judgment of law, sustained damages by reason of the injunction, and the defendants are not indebted to them.

The order appealed from strikes out the answer as sham and irrelevant, and orders "judgment as demanded in the complaint." When an answer is thus stricken out, the plaintiff proceeds to perfect judgment, precisely as if no answer has been put in.

The summons in this case is one for relief. The clerk cannot enter judgment under § 246 of the Code, because there is no "amount mentioned in the summons."

As the plaintiffs must apply to the Court for the relief demanded in the complaint, the defendants are entitled to eight days' notice thereof (*Code*, § 246, sub. 2). This notice cannot be given until the action is in such a stage that it can truly be said that an answer is due, and there is no answer in the action.

I think this order should be reversed.

Ordered accordingly.

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MORGAN *against* MORGAN.*Supreme Court, Fifth District ; Special Term, Nov., 1865.*

COSTS ON APPEAL FROM SURROGATE'S COURT.

Upon an appeal to the Supreme Court from a Surrogate's Court, the successful party is not entitled to costs as in a civil action, at the rates fixed by section 307 of the Code of Procedure, but only the costs of trial of an issue of law.

Motion for retaxation of costs.

An appeal was taken to the Supreme Court from a decree rendered by the Surrogate of the County of Oneida in favor of a former guardian against his late ward and her new guardian, in a proceeding to settle the accounts of the former guardian after his removal. The appeal was argued at a general term for the Fifth District, held in April, 1865, and the decree of the Surrogate affirmed. The attorney for the guardian thereupon noticed his costs for taxation before the Clerk of the County of Oneida, and objection being made that the order of affirmance said nothing about the costs of the appeal, and that he could have no costs without a special direction to that effect, the bill was withdrawn, and a motion made at a subsequent general term of the same district to modify the order of affirmance by awarding costs to the respondents. After argument of that motion, the following order was made :

[*Title of the cause.*]

At a General Term, &c.

"Order of April general term, 1865, amended, by directing that the costs of the appeal be paid to the plaintiff by the guardian of the defendant out of the infant's estate."

The attorney, for the guardian thereupon noticed his costs again for taxation, and presented to the clerk a bill containing, besides disbursements, the following items :

"For proceedings before argument, \$20 : for argument, \$40."

Upon the objection of the attorney for the appellants, these two items were stricken out by the clerk, who allowed in place

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thereof the sum of twenty dollars for the trial of an issue of law, and taxed the respondent's costs at twenty dollars and disbursements. The respondent thereupon moved to set aside the taxation, and for an order directing the clerk to allow him upon a new taxation the items so stricken out.

O. S. Williams, for the motion.

D. C. Calvin, opposed.

MULLIN, J.—Before the Code, an appeal from the decision of a Surrogate in a proceeding to settle the account of a guardian, belonged to the Court of Chancery (2 *Statutes at Large*, 158, § 13). And the costs, when allowed, were the taxable costs given in cases of appeal in Chancery (2 *Id.*, 642, § 35).

By the Judiciary Act the powers of the Chancellor and of the Court of Chancery were transferred to and vested in the Supreme Court as organized by that Act (4 *Statutes at Large*, 559, § 14). The General Term has, since the Judiciary Act became a law, heard and decided appeals from the decisions of surrogates.

The Code prior to 1862 expressly excluded appeals from the decisions of surrogates from the provisions of the 2nd part of that statute (*Code*, § 471). It followed that while appeals were still allowed under this provision of the Revised Statutes from the decrees of surrogates, the costs given by the Code could not be recovered, and must have been taxed under the fee bill applicable to suits in chancery in force when the Code took effect.

In 1862, §§ 318 and 471 of the Code of Procedure were amended. In the first were inserted the words "including appeals from surrogates' courts," so that these appeals were, as to costs, put on the same footing with appeals in proceedings to review the decisions of inferior courts in special proceedings, and thereafter, such proceedings, including appeals from surrogates' courts, for all purposes of costs, were to be deemed actions at issue on a question of law, from the time the same shall be brought in the Supreme Court, and costs are to be awarded and collected in such manner as the Court shall direct, according to the nature of the case. The amendment of § 318 made it necessary to modify § 471, and it was accordingly amended by inserting after the clause excluding appeals from surrogates' courts from the operation of the second part of the Code these words—" *Except that the costs on such appeal shall be regulated and allowed in the manner provided in § 318.*"

Without stopping to inquire whether the right to costs is absolute, or whether it rests in the discretion of the Court, it is quite clear that it was not the intention to give the costs allowed by § 307 to the successful party on an appeal in an action in the Supreme Court.

If it had been the intention to give such costs, it was only necessary to provide that the appeal from the decision of a surrogate should be deemed to be an appeal in an action, or to declare that the successful party should recover the costs prescribed in § 307. So far from this, such appeals are put on the same footing of appeals from orders in special proceedings, and it is quite certain that it was never the intention to give on such appeals the costs given by § 307 on appeals in actions in the Supreme Court.

The costs given by that section would, in many cases of appeals in special proceedings, be more than the whole value of the subject matter of the litigation. By prescribing a measure of costs which may be recovered in these proceedings, the legislature has manifestly excluded every other measure. That measure is one which is clearly defined, and of easy application.

The section declares that for the purposes of costs, such proceedings and appeals shall be deemed actions at issue on a question of law from the time the same shall be brought into the Supreme Court. Unless these words were intended to give the costs in such an issue in the cases enumerated, they are wholly unnecessary. If the intention was to give the costs provided for by § 307, it was not necessary to allude to the nature of the issue. The sense was only rendered obscure by such a reference.

I am therefore constrained to hold that the attorney for the guardian can only recover the costs given by the Code in an action in which there is an issue of law.

The counsel for the guardian insists that the reference in § 318 to an issue of law, is made to indicate that the questions thereafter to be mooted are questions of law and not of fact. But it seems to me that this mode of conducting the proceedings after the appeal to the Supreme Court prescribed by Rule 44, contemplates a review of the disputed items of an account as well on the facts as the law. And in practice the contest on the appeal is more frequently in regard to the correctness of the finding of the surrogate on the facts, than on his mistakes in applying the law.

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I have not considered the question whether the counsel for the guardian is or not entitled to the costs given in actions where there has been a demurrer interposed, as no such question was presented to the taxing officer. The question is one worthy of consideration.

I must affirm the taxation, but without costs, as the question is, so far as I can find, entirely new.

GRAY *against* HANNAH.

Supreme Court, Eighth District; General Term, Jan., 1866.

COSTS ON APPEAL FROM JUSTICE'S COURT.—NOTICE OF APPEAL.

Under Section 371 of the Code of Procedure, if a party appealing from a justice's judgment would entitle himself to costs, his notice of appeal must specify in plain and explicit language what the error or mistake of the justice really was.

If the judgment was a recovery upon a single cause of action for unliquidated damages, a notice merely stating that the judgment should not have been for a sum exceeding a specified smaller amount, without pointing out any element in the damages that was erroneous, is not sufficient to entitle the appellant to costs.

Appeal from an order of a county court.

This action was brought in a Justice's Court, by David Gray, against Alexander Hannah. The material facts are stated in the opinion of the court.

H. H. Woodward, for the appellant.

J. H. McDonald, for the respondent.

BY THE COURT.*—E. DARWIN SMITH, J.—The plaintiff sued the defendant in a justice court in trespass, for damages done by the defendant's dog in killing his sheep, and recovered a verdict for eighty-six dollars, damages. The defendant appealed

* Present T. A. JOHNSON, J. C. SMITH and E. D. SMITH, JJ.

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to the County Court, where the cause was retried and the defendant succeeded in reducing the plaintiff's recovery to eighty dollars, for which the plaintiff had a verdict in the County Court. The defendant claimed costs upon the appeal and the County Court decided that he was entitled to recover costs, and directed that they be adjusted and applied upon the judgment. From this order the plaintiff appeals.

The question for us is whether the statute regulating costs upon appeals from Justices' Courts require such a construction as shall cast upon a plaintiff who has a good cause of action, the whole costs of a litigation because one jury differed from another in respect to the extent of his damages to the amount of six dollars, and he had sought to save expense by suing in a justice's court, when if he had sued in this court he would have recovered full costs.

The order of the county court was based upon the provision of section 371 of the Code, giving costs to the appellant when the judgment in the county court is more favorable to the appellant than the judgment in the court below, in certain cases.

The notice of appeal in the case contains six specifications alleging error in the Justice Court, four of which relate to the merits and to the proceedings on the trial. The fifth was "that the judgment should have been for the defendant," and the sixth, "that the judgment should not have been for a sum exceeding thirty-five dollars, with costs, and the defendant therefore offers to allow such judgment to be corrected accordingly." The omission of plaintiff to offer to amend the judgment by reducing it to thirty-five dollars, or to make any offer to reduce the amount of damages recovered, is the basis of, and reason for, the order giving the appellant costs of the appeal.

The learned County Judge is not without considerable authority in this court for his decision. The cases of *Fox v. Nellis*, 25 *How. Pr.*, 144, and *Loomis v. Higbie*, 29 *How. Pr.*, 232, fully I think sustain the decision, and perhaps some other cases.

Section 371 of the Code requires the party appealing from a judgment of a Justice of the Peace to the County Court, to state in his notice of appeal "in what particular or particulars, he claims the judgment should have been more favorable to him," and provides that within 15 days after the service of the notice of appeal the respondent may serve upon the appellant an offer in writing to allow the judgment to be corrected in any

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of the particulars mentioned in the notice of appeal, and that the appellant, within five days thereafter, may accept such offer, &c. And it is further provided that if such offer is not made and the judgment in the appellate court be more favorable to the appellant than the judgment in the court below, then he shall recover costs.

The plaintiff in this case made no offer, and he is clearly liable for costs, and the order of the County Court clearly right, if the appellant has imposed such duty upon him at the peril of paying costs, if the judgment on the appeal, as it is, be more favorable to the appellant in the County Court. The duty of the plaintiff in such case, if he would escape such liability for costs, depends upon the question whether the appellant has in his notice of appeal stated any particular in which he claims that the judgment should have been more favorable to him. Of the two specifications made as above set forth, the first is clearly no such particular, within any of the cases. It is simply an assertion, in effect, that the entire judgment is erroneous. The second specification, "that the judgment should have been for a sum not exceeding thirty-five dollars, with costs," is the only specification relied on by counsel to sustain the order of the County Court, and is the one upon which it was based by the county Judge.

I do not think this is a statement of any particular in which the judgment should have been more favorable to the appellant, within the true intent and meaning of the term as used in section 371.

The object and meaning of this section, and the evil it was intended to obviate, are well stated by Judge Campbell in *Wynkoop v. Holbert*, 25 *How. Pr.*, 158, and by Judge Daniels in *Forsyth v. Ferguson*, 27 *Id.*, 67.

Judge Campbell says that formerly, "judgments were entirely reversed for errors, which it was manifest affected only parts or portions of such judgments," and says this statute enables a party aggrieved to "point out any particular which he claims to be error." And Judge Daniels well says the appellant "must specify, separate or distinguish in a tangible form so that the respondent may comprehend the precise change in the judgment to which he is willing to consent. Terms of a general nature are not sufficient."

I think this is a true exposition of the section.

Unless such a specification is made by the appellant the plaintiff is not bound to make any offer. The statement in this case that the judgment should not have exceeded thirty-five dollars, does not specify, point out, or distinguish any particular error. It does not show why that sum is named in preference to any other sum from one dollar up to eighty. It does not point to any element in the damages that is erroneous, any principle adopted in estimating damages that was mistaken, and involved the error of all the judgment above thirty-five dollars. It does not show that any mistake of calculation was made, any erroneous item allowed—or any one or more error of fact—or misapplication of law or misconstruction of the evidence led to the excess over thirty five dollars. The action is trespass for destroying plaintiff's sheep. The statement does not show any error or claim any mistake in respect to the number of sheep destroyed, any error in the valuation of the sheep or any of them, explanatory of the excess in the judgment over thirty-five dollars. If the judgment had been recovered upon several items of an account or claim of any nature—as for several promissory notes—or several distinct trespasses—the specification in the notice of appeal should state which of the several claims allowed or embraced in the judgment was or was not claimed to be erroneous. The intent of the statute is that the appellant shall in his notice of appeal show distinctly what the error or mistake of the Justice in his decision really was, in language plain and explicit. To interpret this statute so as to allow such general statements of alleged errors in judgments as in this case, to be sufficient to call upon the respondent to make an offer to amend such judgment at the peril of costs for his omission to do so, tends, it seems to me, to defeat rather than subserve the salutary object of the legislature in its passage.

This is well illustrated by Judge Balcom in *Loomis v. Higbie*, (*supra*) where he shows if such general statements of the particulars in which the appellant claims the judgment to be excessive are allowed to satisfy the statute, a party against whom a judgment is recovered in a Justice Court for one hundred and fifty dollars, as in that case, has only to say in his notice of appeal that the judgment was for one hundred and forty-nine dollars too much, or that it should have been for one hundred and forty-nine less, to cast upon the opposite party the risk of the whole

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litigation, unless he stipulate at once to remit all his judgment except the one dollar. In that case the specification which was held sufficient to impose upon the plaintiff the duty to make an offer, notwithstanding its absurdity was so well exposed, and was in these words—"the judgment should have been for a less amount of damages against the defendant." It seems to me, with all due deference to brother Balcom, that that is not the statement of any particular in which the judgment in that case was erroneous, within any fair and just construction of this statute.

It is about as general and vague a statement of error as could be made. It points to no element or ground of error in assessing damage. It shows no reason or ground for the statement that the judgment should have been for a less sum. It states no fact, refers to no item of claim, or of account, going back of the judgment itself. It simply assails the whole judgment. It scarcely could have been more vague, general or uncertain, if it had simply said the judgment was wrong and should have been for the defendant; it does not impliedly admit that that plaintiff should recover any sum above nominal damages.

The case of *Fox v. Nellis* (25 *How. Pr.*, 144), is I think equally mistaken. The judgment in that case before the Justice was for \$159.50. The specification in the notice of appeal which was held good was in these words. "The judgment at most should not have been for more than \$5." Upon such a notice the plaintiff, who recovered \$130 in the County Court, was held bound to pay costs to the appellant.

It seems to me that this notice did not comply with the statute. It did not state *any particular* in which the judgment was erroneous. It stated no reason or ground for the allegation that the judgment should be only five dollars. It specified no error in making up the judgment. It pointed out no mistake or *misconception* by the Justice in law or fact leading to the pretended error of the Justice of \$154.50.

It seems to me that the Court should hold that it will not deprive a successful party of his costs upon any notice or specification of error so vague, so inexplicit, as that in either of these cases.

Such an interpretation of the statute we cannot but see does great injustice. A party who seeks to throw upon his adversary

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the hazard of further litigation should take his ground and put the opposite party upon his guard, in clear, explicit and not doubtful language, in his notice of appeal. He should point out clearly the error he complains of, so that his adversary may know what precise part of the claim is particularly disputed and will be contested upon the appeal. I think the order of the County Judge in this case should be reversed, and the defendant's motion for costs should be denied, with \$10 costs of appeal.

Order accordingly.

revised
by 342

SOULE *against* CHASE.

New York Superior Court ; General Term, November, 1863

PROCEEDINGS IN INSOLVENCY.—JURISDICTION.—PROOF OF SERVICE
BY PUBLICATION.—AFFIDAVIT.—EFFECT OF DISCHARGE.

In proceedings for the discharge of an insolvent from his debts, under 2 Rev. Stat., 35, the omission of a petitioning creditor to relinquish a security held by him, does not affect the jurisdiction of the officer, nor avoid the discharge, even though his petition disclosed the existence of such security.

Nor is the proof of publication of notice of the order to creditors to show cause, essential to give jurisdiction. A discharge which recites due publication and that due proof thereof was presented, is not invalidated by defects in the notice, in its publication, or in the proof thereof, on file.

The statute does not require publication for a certain length of time, but ten publications, each within so many successive weeks, the commencement of which is determined by the first publication.

Proof that a notice was "published in the New York Day Book" is sufficient to show compliance with an order that it be published in "the newspaper published in the city of New York, entitled 'the Evening Day Book,' in the absence of any evidence of the existence of two papers with the title of Day Book.

An affidavit, in the commencement of which the deponent is designated by name, is not void for not being subscribed by him.

The published notice of an order to creditors to show cause, stating that the proceeding is for the discharge of an insolvent from his debts, need not specify the particular statute under which it is had, and adding a defective reference to the statute does not vitiate.

The proof of publication of such notice is not limited by the statute, to an affidavit of the printer or the clerk or foreman of the printer, although it enables the insolvent to perpetuate the evidence by taking their affidavit. The petitions and schedules need not state the grounds of the demands of creditors with such particularity as is required in a statement for judgment by confession; and *it seems* that want of sufficient particularity does not affect the jurisdiction of the officer.

Where a discharge recites all the required jurisdictional facts and proceedings, the county clerk's certificate that certain papers, technically insufficient to show jurisdiction, are all that have been filed with him in the proceeding, is not, of itself, sufficient to disprove the recitals.

Whether a name in the list of creditors variant from that of the plaintiffs' was intended to designate them; or whether their names were omitted, and if so, whether the omission was fraudulent;—*Held*, in this case properly submitted to the jury.

An insolvent's discharge, granted under the laws of this State, is a good defence to an action on a judgment recovered here, in the absence of any evidence as to where the contract was made on which the judgment was recovered. Evidence that the creditor was a non-resident is not material.

Appeal from an order denying a motion for a new trial, and also from a judgment entered on the verdict.

The action was brought by Harvey M., and George H. Soule against Thomas B. Chase, on a judgment for two hundred and twenty-four dollars and nineteen cents, which the plaintiffs had recovered against the defendant in May, 1855.

The defendant in his answer set up an insolvent's discharge from his debts, granted to him since that date, and alleged that he was, at the time of the recovery of the judgment, a resident of the State of New York.

The cause was tried on the 4th day of June, 1863, before Mr. Justice MONCRIEF, and a jury.

The defendant, in support of his answer, gave in evidence his discharge, and the proceedings on which it was granted by the County Judge of Kings County. The discharge was in the usual form. It contained the following recitals:

"Whereas, Thomas B. Chase, of the City of Brooklyn, an insolvent debtor, residing within the said city, did, in conjunction with so many of his creditors, residing within the United States, as have debts in good faith owing to them by the said insolvent, amounting to at least two-thirds of all the debts owing by him

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to creditors residing within the United States, present a petition to me, praying that the estate of the said insolvent might be assigned for the benefit of his creditors, and he be discharged from his debts, pursuant to the provisions of a statute authorizing an insolvent debtor to be discharged from his debts; whereupon I ordered notice to be given to all the creditors of the said insolvent to show cause, if any they had, before me, at a certain time and place, why an assignment of the said insolvent's estate should not be made, and he be discharged from his debts, proof of the publication whereof hath been duly made. And whereas, it satisfactorily appears to me that the doings on the part of the creditors are just and fair, and that the said insolvent has conformed in all things to those matters required of him by the said statute, I directed," &c., &c.

The affidavits of several of the petitioning creditors, upon which the application for the discharge was made, averred, respectively, that the sum claimed was justly due to the defendant "from the said insolvent, for goods, wares, and merchandise sold and delivered, and secured by endorsement of promissory note of C. W. Smith, now due and payable; and that neither he, nor any person to his use, hath received from the said insolvent, or any other person, payment of any demand, or any part thereof, in money, or in any way whatever, or any gift or reward whatsoever, upon any express or implied trust or confidence, that he should become a petitioner for the said insolvent."

The affidavit of John Robinson, one of the petitioning creditors, described his demand as "for goods, wares and merchandise, secured by indorsement," &c., continuing as above, but without the words, "sold and delivered."

There was no evidence in any of the papers produced, of any relinquishment by these creditors of the security mentioned in their affidavits.

C. W. Smith was not mentioned in the schedules as a debtor or creditor of the insolvent.

The order of the County Judge, requiring creditors to show cause why an assignment of the said insolvent's estate should not be made, and he be discharged from his debts, pursuant to the statute, directed notice of the same "to be published for ten weeks in the State paper, and in the newspaper printed in the city of New York, entitled the *Evening Day Book*, and the newspaper

printed in the city of Brooklyn, entitled the Brooklyn *Daily Eagle*."

The notice, as published in the State paper, was entitled and commenced with a reference to the statute under which the proceedings were taken, as follows:

"Notice of application for the discharge of an insolvent from his debts, pursuant to the third article of the first title of the fifth chapter of the second part of the Revised Statutes.

In the copy published in the *Brooklyn Eagle*, the words "of the fifth chapter," were omitted; and in that published in the *Day Book*, the words, "of the second part," were omitted.

The publication was once in each week for ten weeks successively, commencing, in the State paper, on the 21st of May, 1859, in the *Eagle* on the 20th, and in the *Day Book* on the 28th of May. The order was returnable on the 1st of August. The affidavit of publication in the *Day Book* was in the following terms:

"G. C. Stimson, of the city of New York, being duly sworn, says: That he is a clerk in the office of the New York *Day Book*, a daily paper printed and published in the city of New York, and that the notice, of which the annexed is a printed copy, has been regularly published in the New York *Day Book*, once a week for ten weeks successively, commencing on the 28th day of May, 1859."

Each of the other affidavits alleged the deponent to be "foreman in the office" of the paper designated, but did not state that he was foreman of the printer. The affidavit of publication in the State paper contained the deponent's name in the commencement, as is usual, but was without signature. It was, however, certified by a commissioner of deeds with the usual jurat.

In the debtor's schedule, or account of his creditors, the nature of the debts, and the cause and consideration of them were indicated only by the following phrases, set opposite the creditors' names:

Promissory notes for merchandise sold and delivered	
Promissory notes for merchandise sold, delivered, and a book ac't. . .	
Promissory note for merchandise sold and delivered	
Endorsement on promissory note for goods, wares, and merchandise, .	
Endorsement on note for goods and merchandise, and various stocks, .	
Endorsement on note for goods, wares, and merchandise.	
Promissory note for goods sold and delivered	
Book account for merchandise sold and delivered	
Endorsement on note for goods sold and delivered	

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The list of creditors contained the name of W. G. Soule, of New York, as a creditor to the amount of two hundred and six dollars and seventy-four cents, accrued at New York on a promissory note for merchandise sold and delivered. In the affidavit of personal service of the order to show cause, this creditor was designated at W. G. Sauri. The plaintiffs were not named, unless they were intended by these names.

The papers produced in evidence with the discharge, as being a copy of the proceedings on which it was granted, were certified to by the county clerk as having been compared by him "with the original papers in the matter of Thomas B. Chase, an insolvent debtor, on file in my office, and that they are the true transcripts thereof, and of the whole of said original."

Various objections to the validity of the discharge, which were taken by the plaintiffs, are stated in the opinion of the Court. The plaintiffs also offered to prove by a witness, that the plaintiffs at the time the debt was contracted by the defendant, were both not only non-residents of the State of New York, but were also citizens of another State.

This was excluded by the Court, to which ruling the plaintiffs excepted.

The witness, in answer to the following question :

"Did the plaintiffs receive notice of the defendant's application to be discharged from his debts, being the discharge offered in evidence?" testified as follows:

"They never did;" "I and my partner have done business in the firm-name of H. & G. Soule for the past sixteen years, and both of us lived in New Jersey during that time."

The Court refused the plaintiffs' request that the jury be instructed to find in their favor, and charged the jury, that they must determine whether the names of the plaintiffs in this suit were omitted from the proceedings for the discharge, and if so, whether such omission was with fraudulent intent. To this the plaintiffs excepted.

The jury rendered a verdict for the defendant; and the plaintiffs' motion for a new trial having been denied and the judgment having been entered, they now appealed.

D. M. Porter, for the plaintiffs appellants.—I. There is a variance in the title of the newspaper printed in New York, in which the Judge ordered the notice to be published. The order

was for the newspaper entitled "The *Evening Day Book*." The proof is of its publication in "The New York *Day Book*," and was not a compliance with the order. (*Brisbane v. Peabody*, 3 *How. Pr.*, 109; *Hallett v. Righters*, 13 *Id.*, 43.)

II. By the affidavit of G. C. Stimpson of the publication in the New York *Day Book*, the first publication was May 28th, 1859. The affidavit was made July 30th, 1859, within the *ninth week* after the first publication, and by no reasoning could it be held to be a publication for *ten weeks* where the affidavit was made within the *ninth week*, it being made on the *sixty-third day of the publication*, and it gave the officer no jurisdiction to grant the discharge. It presents an entirely different case than it would where the affidavit had been made after the expiration of the *ninth week*, but before the *tenth week* had expired, but even in that case, the discharge would be void. (*Demarest v. Gray*, 10 *Abb. Pr.*, 468; *Small v. Wheaton*, 2 *Id.*, 175. In the matter of Underwood, 3 *Cow.*, 59; Anonymous, 1 *Wend.*, 90; *Stanton v. Ellis*, 16 *Barb.*, 319.)

Chase's creditors were required to appear before the ten weeks could elapse before the first publication.

III. By the omission in describing the Revised Statutes, the notice does not designate whether the application would be made under "the Two-thirds act," "the Non-imprisonment act," "the Stillwell act," or "the Fourteen Day act," and is not a notice of defendant's application under the former.

IV. The affidavits do not show that the notices were published ten weeks under and in pursuance of the Judge's order. *Hallett v. Righters and Salter, supra*. Nor do they show that the persons making them were competent, inasmuch as they do not swear that they are either principal clerks or foremen of the printers. They might be clerks or foremen in the office, and still not be foremen of the printers. The person making the affidavit must be the printer, or the clerk or foreman of the printer. Sec. 7, 3d Revised Statutes, page 686.

V. What purports to be the affidavit of publication in the State paper is not an affidavit, because *it is not signed by the deponent*; the oath is not binding, as no perjury could be charged upon such a paper. Consequently, there is no proof of such publication to give jurisdiction to the Judge to entertain the proceedings. By the definition of an affidavit, it must be signed. (*Laimbeer v. Allen*, 2 *Sandf.*, 647; *Graham v. McCoun*,

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5 *How. Pr.*, 353; also, see cases in 1st *Code Reporter*, 63, 114; *Stanton v. Ellis*, *supra*; *Barker v. Cook*, 16 *Abb. Pr.*, 83.)

"An affidavit is an oath in writing *signed by the party deposing*, sworn before and attested by him who had authority to administer the same." Definition of an affidavit in Bacon's Abridgement, at head of the title "Affidavits."

VI. There is a want of proper specifications in the affidavits of the petitioning creditors as to the nature of their debts, how and for what they arose, *when* and *where* and *who* were the parties thereto, the consideration and character of the indebtedness.

All and each of these should appear on the papers, and without a full and proper statement thereof, the intent to defraud must be inferred, and becomes a question of law. (*Slidell v. McCrea*, 1 *Wend.*, 156; *Small v. Wheaton*, 2 *Abb. Pr.*, 175, 179; *McNair v. Gilbert*, 3 *Wend.*, 344; *Gillies v. Crawford*, 2 *Hilt.*, 338.)

Sec. 7 (4), of 3 Revised Statutes, page 92 (5th ed.), requires the petitioning creditors to state the nature of the demand, with the general ground and consideration of such indebtedness. The next section specifies what the petitioner shall do. Unless the specifications stated them, subdivisions 3, 4, and 5, of section 7, are nonsense. Chase did not comply with either of these subdivisions. There was no specification as required, nor is there any statement whether there was any security for the indebtedness or not, neither is Smith named as a debtor or creditor.

By the affidavit of John Robinson it does not appear that the property was ever sold or delivered, nor is any specification made of any kind.

In the statement of the debts it should be made to appear how and for what they arose, when and where, who were the parties, the consideration or the character of the indebtedness, who delivered the goods or merchandise, and to whom they were delivered.

Such a specification as was made would not support a judgment. (*Dunham v. Waterman*, 6 *Abb. Pr.*, 357; *Chappel v. Chappel*, 12 *N. Y.* [2 *Kern.*], 215; *Freligh v. Brink*, 16 *How. Pr.*, 272; *Moody v. Townsend*, 3 *Abb. Pr.*, 375; *Stebbins v. The East Society*, 12 *How. Pr.*, 410.)

In the case of *Gandal v. Finn* (13 *How. Pr.*, 418), specifications were much more particular and greater than in these affi-

davits. How much more full, precise, and particular, should every statement be made, in a case where a party's just claim is to be swept away by a judicial statutory proceeding.

It is submitted that no confession of judgment has ever been upheld where no date or place has been given. None are given in the affidavits.

VII. The Court erred in refusing to allow the plaintiffs to show that at the time the debt for which the judgment was rendered was contracted, they were neither residents nor citizens of this State; as the insolvent laws of one State cannot impair debts contracted with the citizens of another State at the time of contract. *Donnelly v. Corbett*, 7 *N. Y.* (3 *Seld.*), 500. Analogous to this case, is *Ogden v. Saunders*, 12 *Wheat.*, 213.

VIII. The discharge was void, inasmuch as the plaintiffs' names were left out of the proceedings. They were residents of New Jersey, and no persons are put in as residing there—nor do their names appear: this claim was for a judgment, and is for a different amount than any claim named—no mention of any judgment is made in the schedule, and the discharge was void. (Subdivision 5 of Sec. 8, 3d *Revised Statutes*, page 93; *Stanton v. Ellis*, 12 *N. Y.* [2 *Kern.*], 575.)

IX. The plaintiffs had no notice of the application which was required by law, which rendered the discharge fraudulent, not as a question of fact but of law. (Cases above cited.)

X. There was no schedule of the defendant's creditors sworn to, as required by Sec. 8 of the *Revised Statutes*. As the word "*sworn*" is left off, there is no jurat—and the oath can only be administered by the Judge granting the discharge. (*Small v. Wheaton*, *supra*.) The same objection is taken to the oath to the schedule of the nature of the indebtedness, and where the creditors resided, required by Sec. 8.

XI. This application of the defendant was a special statutory proceeding, and if any essential prerequisite was wanting, the discharge is a nullity. (*Small v. Wheaton*, 2 *Abb. Pr.*, 175, and the cases there cited.) And the discharge being fraudulent in law, the Court ought to have directed judgment for the plaintiffs on their motion. In the matter of *Underwood*, 3 *Cow.*, 59; and see 2 *Kern.*, 575.

The Court is now asked to correct the error.

It is submitted that if the discharge is held invalid for any jurisdictional defect in the proceedings, no possible state of proof

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will entitle the defendant to judgment, and it brings this case within the rule laid down in *Edmonston v. McLoud* (16 *N. Y.* [2 *Smith*], 543); and final judgment should be given for the plaintiffs.

E. R. Bogardus, for the defendant, respondent.

BY THE COURT.*—ROBERTSON, J.—The following objections were made, on the trial, to the validity of the defendant's insolvent discharge, founded solely upon what was produced in evidence as the proceedings by which it was obtained.

1st. Too short a publication in the *New York Day Book*, of the notice to show cause against such discharge.

2d. Non-publication of such notice in any paper entitled the *Evening Day Book*, as required by the order.

3d. Want of proper specification in the affidavits of petitioning creditors of "the nature of their debts and claims, how and for what they arose, when and where, who were the parties, the consideration and character of the indebtedness, who delivered the goods, wares, and merchandise, or to whom they were delivered."

4th. The omission of the names of the plaintiffs in the proceedings.

5th. The omission from the defendant's list of creditors of the name of C. W. Smith, whose endorsements are alleged in the affidavits of petitioning creditors as securing their debts.

6th. Like want of specification of the nature of the creditors' demands, in the defendant's statements of them, as in their affidavits of indebtedness.

7th. The absence of any signature subscribed to the proof of publication in the State paper.

To these objections the plaintiffs' counsel now adds another, of the failure of the petitioning creditor to relinquish to the assignee, by a statement at the foot of their affidavit, the security, which by such affidavit they appear to have.

Such of these objections as do not relate to jurisdictional facts are cured by the provisions of law which make the discharge *conclusive* evidence of the facts recited in it (2 R. S., 38, § 19), and enumerates for what causes the discharge may be set aside, (2 R. S., 23, § 34, 5th Ed., 40.) Formerly they excluded all con-

* Present MONCRIEF, ROBERTSON and MONELL, JJ.

test even on jurisdictional facts (*Lester v. Thompson*, 1 *Johns.*, 300; *Jenks v. Stebbins*, 11 *Id.*, 244; *People v. Stryker*, 24 *Barb.*, 649); but the more recent case of *Stanton v. Ellis* (12 *N. Y.* [2 *Kern.*], 576; S. C., 16 *Barb.*, 319) reduces the effect of the recitals as to jurisdictional facts to mere prima facie evidence.

What are necessary jurisdictional facts are clearly and succinctly enumerated in the case of *Rusher v. Sherman* (28 *Barb.*, 416), in which they are stated by the learned Judge who decided that case to be—

1st. A proper petition by proper parties.

2d. Proper affidavits, by the petitioning creditors, of the nature, amount and consideration of their debts, and their freedom from any bribe.

3d. A proper account of creditors, and the amounts due them, the consideration of their debts, and any security held by them therefor.

4th. A proper inventory.

5th. The oath of the insolvent, *before the officer*, as to the accuracy of his petition and schedule, and other matters required by the statute.

6th. Proof of residence.

I cannot regard the relinquishment by the petitioning creditor of any security held by him before he became a petitioning creditor, as a jurisdictional fact (2 R. S., 36, § 21). The statute provides no mode of informing the officer of their existence, except by the statement in the petition or schedule annexed. In this case the statement of it in the creditor's affidavit was superfluous, because not required by the statute. The statute did not intend that the whole proceedings should be had for nought if it should afterwards be accidentally discovered that the petitioning creditor held a security which he had omitted to relinquish. It might form a good objection to granting the discharge on the hearing, and possibly might be cured by relinquishment even at that time.

The provision in regard to such relinquishment forms no part of the article prescribing the proceedings to be had before procuring the order for publication of the notice to show cause, and is only directory in form. Moreover, in this case, no mention is made of any securities held by the petitioning creditors in the insolvent's schedule of debts, and although proof may be now

offered *aliunde* of the existence of such securities, such omission will not affect the validity of the discharge (*Stanton v. Ellis*, 12 *N. Y.* [2 *Kern.*], 575, per DENIO, J.) The accidental statement in the affidavits of petitioning creditors in this case, that their claim is secured by said endorsement, did not make it incumbent on the officer to see that it was given up. The statute only required that the documents mentioned in the case of *Rusher v. Sherman* (*ubi sup.*) as jurisdictional, shall be presented to the officer to procure the order for publication, and upon such presentation and order he acquires jurisdiction.

The proof of publication required by the statute is not a jurisdictional fact; the decision of the Supreme Court in *Stanton v. Ellis* (*ubi sup.*) to that effect is doubted by the Judge who gave the only opinion in the same case on appeal (12 *N. Y.*, 580, DENIO, J.) He says he "suspects it is not;" thus giving as strong an impression as possible, considering that the point was not necessary to the case. He intimates very strongly in that case that jurisdiction begins on granting the order before the publication is made. The statute merely *directs* proof to be made before inquiring into the merits; while the amendment in 1847 as to one mode of service which prescribes that the proof shall be *satisfactory to the officer* (Sess. Laws of 1847, Ch. 366, § 2), neither states whether it shall be made by affidavit or orally. There was no evidence in this case that the affidavits offered were the only proofs of publication received by the officer; and the recitals in the discharge are at least *prima facie* evidence of due proof, even if it were a jurisdictional fact; and the same principles will apply to all the other objections except the contents of the papers presented to the officer. But even if they were the only evidence, they are sufficient.

The objection of too short a publication of the notice to show cause was properly overruled, because the statute only requires ten publications, each one of which is to be successively within one of ten successive weeks (2 R. S., 18, § 11, [14],) the commencement whereof is determined by the first publication (*Sheldon v. Wright*, 5 *N. Y.* [1 *Seld.*], 497; S. C., 7 *Barb.*, 39; see 1 *Mass.*, 255). A contrary doctrine upheld in *The People v. Yates* C. P. (1 *Wend.*, 90), followed in *Bunce v. Reed* at Special Term (16 *Barb.*, 347), is overruled by the cases last cited. The difference, when a definite period of publication, such as ten weeks, and not the number of publications is fixed, was over-

looked in those cases. In the statute, no length of time is prescribed during which the notice to show cause must be given, except by such order of publication.

The question of the name of the newspaper, *The Day Book*, is entirely one of identity. The affidavit of publication complained of does not aver the title of the paper to be the New York Day Book, but designates it by that name as a New York newspaper. In the order of publication, the term "*Evening*" may have been used merely to specify it as an afternoon issue. There was no evidence of the existence of two papers, published in the city of New York, with the title of Day Book, to create a patent ambiguity. Similar variances have been held immaterial even in actions for torts. (*Southwick v. Stevens*, 10 *Johns*, 443.) Extrinsic circumstances are admissible to show who is intended by a certain name. (*People v. Ferguson*, 8 *Cow.*, 102.) Even the entire omission of the christened name of a person has been held to be immaterial.

The want of a signature subscribed to another affidavit of publication is also immaterial. In this case the affiant's name was at the head of the affidavit, and that, in the case of wills and agreements under the former Statute of Frauds, was held to be a sufficient signature.

The same view was taken in *Jackson v. Virgil* (3 *Johns.*, 539), where a signature was omitted. The only object of a signature or mark (*signum*) is to identify the deposition sworn to. Persons incapable of making either a signature or mark by disease or natural infirmities or defects, are not debarred from making an affidavit, which is but written testimony. The description in Bacon's Abridgment (Tit. *Affidavits*) of an affidavit will hardly stand any critical examination as a definition. It is there called an *oath in writing administered*; how that can be when the form is presented orally, is not very clear. The case of *Laimbeer v. Allen* (2 *Sandf.*, 647), decided at Special Term, where the question arose on a pleading not an affidavit, and was hastily considered without any notice of the case of *Jackson v. Virgil* (*ubi sup.*) can hardly be considered as overruling it.

There is no statutory provision requiring the particular act of the Legislature under which the applicant seeks relief, to be designated in the published notice to show cause. The Revised Statutes only require him to state therein, merely whether he seeks a discharge from his debts or only from imprisonment. (2

R. S., 648, § 44). The proof of publication is not limited by statute to any particular person; although it enables an insolvent to perpetuate such evidence when made by specified persons. The objections made on the score of an omission in the notice of the subdivisions of the Revised Statutes in which the Two-Third act is to be found, as well as of the person making the affidavit, therefore, fall to the ground.

The statutory requisites that the nature of the demands of the petitioning creditors, as well as whether they arise on a written security or otherwise, and their general grounds and consideration, shall be stated in their affidavits, and that their true cause and consideration shall be stated in the debtor's schedule annexed to his petition, seem to have been sufficiently complied with. If enough is stated to apprise disputing or opposing creditors of the general grounds of indebtedness, such as *money lent, money paid, or services at the debtor's request*, it has been held to be sufficient, because it gives them a clue to inquiry (Taylor v. Williams, 20 Johns., 21). Defects in such statements, arising from want of particularity, have been held to be cured by the discharge, and even to be curable at the hearing (In matter of Hurst, 7 Wend., 239). Want of particularity differs from an entire omission of the consideration (McNair v. Gilbert, 3 Wend., 344). It was not necessary to specify to whom the goods were sold and delivered, or when, with the particularity required in a complaint, or even in the specification required by the Code of Procedure to be annexed to a confession of judgment (§ 383). That exacts a concise statement of "*the facts out of which the liability*" arises, which is far more extensive than "*the nature of the demand and ground and consideration of the indebtedness.*" None of the conflicting decisions in regard to that section of the Code would therefore be applicable. The subsequent provision in the Statute authorizing the officer to whom the application is made, to commence his acts for granting the discharge by directing an assignment upon being satisfied of the appearance of certain matters (2 R. S., 21, § 25), would alone throw great doubt on the question whether the proper description of the indebtedness of the insolvent to petitioning creditors, which is not one of those matters, was a jurisdictional fact. That provision only requires the officer to be satisfied of the insolvent's indebtedness to the creditors for the amount claimed, without reference to its origin or nature.

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A mistake in anything but the amount would seem to be capable of being overlooked. On the fact of the indebtedness and its being two-thirds, the discharge seems to be conclusive (*Betts v. Bagley*, 12 *Peck*, 872). The language of Judge DENIO, in *Van Alstyne v. Erwine* (11 *N. Y.* [1 *Kern.*], 331), in reference to another, and of special proceeding quoted with approbation by the learned Judge who delivered the opinion in *Rusher v. Sherman* (*ubi sup.*), is still more apt in regard to insolvent discharges, for without "the liberal indulgence" challenged by him "even on questions of jurisdiction," proceedings to obtain them would be "*a snare instead of a beneficial remedy.*"

But most if not all of these objections are technical and founded on the supposition that the recitals in the discharge are contradicted by the sole want of conformity of certain documents produced from the County Clerk's office to the provisions of Statute. There was no evidence obtained to show that the officer granting the discharge had not other evidence before him of the facts recited in the discharge than appeared in the papers so produced. The County Clerk certified that he had compared the latter with "*the original papers*, in the matter of Thomas B. Chase *on file in his office*," and that they were true transcripts of the whole of them. He probably knew nothing of such original papers except they were on file in his office: by whom filed, or when, did not appear. The case states that they were a copy of *the proceedings and discharge*. They consisted of what purported to be copies of a discharge; assignment; some affidavits of publication and personal service of notice on creditors; an order for an assignment; a certificate of its execution by the assignee and of its record by a County Clerk; an order of publication of notice; a petition by the defendant and some creditors, and an affidavit of his good faith; some affidavits of such creditors; a list of them and their residences; a schedule of the nature of their debts; and an inventory of the insolvent's estate. These undoubtedly were a compliance with some of the provisions of the statute, but are not proved to include every thing that took place before the officer. He is required to file "*all proceedings*" to obtain a discharge, within a certain time after the same shall have been consummated, with the Clerk of his County (2 *R. S.*, 39, § 27). What is meant by "*proceedings*" does not clearly appear from such provision, whether they include those required to be reported by such an officer to

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another Court (2 *R. S.*, 10, § 46; *Ib.*, 13, § 68), those for obtaining a jury (2 *R. S.*, 26, § 14; *Ib.*, 29, § 6), or the minutes required to be kept by such officer of the testimony of witnesses examined before him (2 *R. S.*, 37, § 16), which might include proof of due publication of the notice to show cause,—does not appear. In some parts of the title containing the statute in question, the term “proceedings” is evidently used to signify all the steps taken to procure a discharge, according to its proper meaning. Under such circumstances the *prima facie* evidence that all the jurisdictional proceedings and facts recited in the discharge took place, created by law from such recital, is hardly repelled by a County Clerk’s certificate, that certain documents are copies of all the original papers filed in the matter of such insolvency in his office, without evidence to show that the proper proceedings did not take place before the officer certifying in the discharge granted by him that they did.

The question of fraud growing out of a supposed omission of the plaintiffs’ names from the documents presented by the defendant to obtain the order to show cause against his discharge, was submitted to the jury. That is entirely different from inserting a creditor’s name and omitting the amount due him, which is held to be essential in *Stanton v. Ellis* (*ubi supra*) because the two thirds cannot be ascertained. In that case it was held that the entire omission of a creditor’s name or insertion of an incorrect amount would not have made the proceedings defective (p. 579, per DENIO, J., 2 *R. S.*, 81, § 3, *subd.* 4).

There was no evidence in the case where the contract, on which the judgment of the plaintiffs sued on was obtained, was made. *Prima facie*, therefore, the discharge was good against it. Proof of a party’s mere residence in another State was immaterial, and properly excluded.

There being no error in the rulings of the Court on the trial, the judgment should be affirmed with costs.

Judgment affirmed.

HASKINS *against* KELLY.*New York Superior Court; General Term, October, 1863.*CLAIM AND DELIVERY.—LEVY.—ACTION AGAINST SHERIFF.—
CHattel MORTGAGE.—EVIDENCE.

A requisition in proceedings of claim and delivery to recover possession of goods, in an action brought for the purpose, against one who purchased them at a wrongful sale, will justify the sheriff in taking them, although the defendant acted as an agent in the purchase, if the papers are served and the seizure made while the goods remain actually in his possession.

One whose goods are taken by the sheriff, in such proceedings against a third person, can maintain an action against the sheriff for damages, notwithstanding his having given the sheriff notice of his claim, under section 216 of the Code of Procedure, and subsequently having withdrawn it for the purpose of permitting the sheriff to deliver the goods.

A transfer of a chattel mortgage, merely by way of collateral security for the payment of a debt is a pledge, not a mortgage thereof; and need not be recorded.

Notwithstanding such pledge the pledgor may afterward assign the mortgage to a third person, who may enforce it by a sale of the goods, subject however to the lien of the pledge.

The lien of a pledge is destroyed by a tender of the amount due.

Where the mortgagor of chattels borrows money to buy in the mortgage, and procures an assignment of it to the lender, as security for repayment of the loan, the mortgage becomes in the hands of the latter a mere pledge for the loan, and is discharged by a tender thereof.

Where the holder of a chattel mortgage pledged it for payment of a certain sum, and subsequently assigned it;—*Held*, that in the assignee's action against third persons for converting the goods mortgaged, evidence of such pledge was admissible as bearing on the question of damages.

Exceptions taken on the trial of the cause, and directed by the court to be heard in the first instance at General Term.

This action was in the nature of trover. It was brought by DEWITT C. HASKINS, to recover from JOHN KELLY, sheriff of the city and county of New York, and THOMAS MURPHY, one of his general deputies, the value of several printing presses and materials, taken and detained by them.

The defendants, answering separately, justified taking the goods by virtue of a requisition for their delivery issued to the

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sheriff in proceedings of claim and delivery under the Code of Procedure, in a former action brought by William M. Hayes against John Miller, at a time when Miller was alleged to have been in possession of the property. For a further answer the defendants alleged that at the time of the commencement of the present action, one John J. Smith, and not the plaintiff, was the owner of the property, and entitled to its possession.

The cause was tried before Mr. Justice WHITE and a jury, on June 9th, 1862, and two following days.

The facts, some of the particulars of which are more fully stated in the opinion of the court, were briefly as follows.

The plaintiff, Haskins, claimed title under a chattel mortgage, and the foreclosure thereof. This mortgage was given by Hayes, originally the owner of the property, to one Thurber, to secure \$3,795, and was dated July 23d, 1860. Hayes procured his friend Vincent to advance him money to obtain an assignment of the mortgage; and to secure Vincent's advances Hayes gave him a bill of sale of the property, and when the assignment of the mortgage was obtained it was made to Vincent, who agreed to allow Hayes to repay him in instalments. This assignment from Thurber to Vincent, was recorded, as was the mortgage itself. Subsequently Hayes borrowed of John J. Smith, \$500—to pay upon the mortgage, and secured the repayment of that loan by his note, and by obtaining Vincent to assign the mortgage to Smith as collateral security. Vincent subsequently assigned the mortgage to the present plaintiff. His former assignment of it to Smith, was not recorded. The amount remaining due to Vincent under the mortgage at the time of the assignment to the plaintiff was \$1,935.—The plaintiff employed a constable (West) to foreclose the mortgage. Hayes, the mortgagor, tendered to West, the amount due, with \$20 additional to cover expenses, which West refused to receive; claiming a much larger sum, including also a charge of \$155, for services in foreclosing, and \$17 expenses. Accordingly West proceeded with the sale: and the property was bid in by John Miller, who acted as agent for the plaintiff. Miller bid in his own name, and immediately proceeded to make an assignment of the property to the plaintiff. Meanwhile Hayes, whose tender had been refused, prepared the papers necessary for an action to recover the property from whomsoever should be the purchaser, and immediately after the sale

and before any change of possession, inserted the name of Miller as defendant therein, and Murphy, one of the defendants in the present action took possession of the goods under the requisition and subsequently served the papers on Miller.

Haskins having received his assignment from Miller, in order to prevent the delivery of the goods to Hayes, served on the sheriff a notice and affidavit, under section 216 of the Code of Procedure, that he claimed to be the owner. Subsequently he served on the sheriff the following notice:

"For the purpose of this action, and to enable you to deliver the property to the defendant, I hereby waive and withdraw the claim I made to the property in question under sec. 216 of the Code, and also withdraw the affidavit presented to you in this case; but this is not to prejudice my title to the property, as between me and the defendant, or any other person. You will please deliver the property to the defendant the same as if such affidavit and claim were never delivered by me to you in this action."

Some weeks after the sale by the plaintiff, Smith caused the property, or part of it, to be sold under his claim upon the mortgage, and bid it in himself.

The plaintiff subsequently commenced the present action to recover damages from the sheriff and his deputy for taking the goods in the proceedings against Miller. The jury found a verdict for the defendants; and the cause now came before the court on the plaintiff's exceptions.

E. F. Bullard, for the plaintiff.—I. All sales by Smith, after his mortgage was paid, were void, and the plaintiff was entitled to recover for the property Smith sold, even if Smith's \$500 interest was prior to the plaintiff's (3 *Den.*, 33; 13 *Barb.*, 631).

II. The defendant did not act under Smith's assignment in taking or holding the property. He was in no manner connected with Smith's title. The court, therefore, erred in admitting the evidence as to the assignment to Smith, and in refusing to charge as requested, that if the jury find that the assignment in question was made to the plaintiff without notice of the assignment to Smith being given to him or his agents, then the plaintiff's rights are prior to Smith's, and are not affected thereby. (6 *Mann. & Gr.*)

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III. Even if the defendant could set up Smith's title, the Court erred in charging, "that Haskins took subject to the rights and equity of Smith, whether they were disclosed to Haskins or not at the time of the transfer to him." It is conceded that the plaintiff took subject to all *latent* equities, which Hayes, the mortgagor, had against the mortgagee, and the plaintiff was bound to inquire of him as to them. But that rule has no application to equities in favor of assignees (unless we claim through them) or third parties, who do not record or give proper notice of their assignment (*Williamson v. Brown*, 15 *N. Y.* [1 *Smith*], 354). If so, no man could take an assignment without inquiring of every man on the globe if he held an assignment of the mortgage before he could safely purchase of the mortgagee.

The assignment to Smith was, in effect, a mortgage for \$500 (*Thompson v. Blanchard*, 4 *N. Y.* [4 *Comst.*], 303). The assignment was therefore void, because it was not recorded as a chattel mortgage. (*Idem.*) The doctrine laid down in *Story Eq.*, § 409; *Corning v. Murray*, 3 *Barb.*, 652, and that class of cases, is not overruled by *Bush v. Lathrop* (22 *N. Y.* [8 *Smith*], 535). The case of *Burr v. King*, decided in the Court of Appeals, in June Term, 1852, but not reported, is directly in point. In that case Pettit held two mortgages upon the same premises, and assigned the younger to King, under such statements as would estop him from setting up the prior mortgage against King. Pettit afterwards assigned the oldest mortgage to Burr. The Court of Appeals held that the latter was not bound by the latent equities of King against Pettit, the plaintiff's assignor.

IV. The Court erred in admitting the evidence of the tender, and in charging that the tender defeated the plaintiff's lien, and that he had no right to foreclose it. The Court should have charged that the tender had no effect. The case of *Kortright v. Cady* (21 *N. Y.* [7 *Smith*], 343), was a case of real estate, and can have no application to chattel mortgages. A mortgage of chattels differs from one of real estate. It is a defeasible sale (*Butler v. Miller*, 1 *N. Y.* [1 *Comst.*], 428; 21 *N. Y.* [7 *Smith*], 347; *Mattison v. Baucus*, 1 *N. Y.* [1 *Comst.*], 295; *Ferguson v. Lee*, 9 *Wend.*, 258; *Brown v. Bement*, 8 *Johns.*, 75; *Patchin v. Pierce*, 12 *Wend.*, 61; *Burdick v. McVanner*, 2 *Den.*, 170). It is conceded a mortgagor may come into equity to redeem. Now, under the Code, if the mortgagee sues in trover for the value, before foreclosure, the defendant, by way of counterclaim in his answer, may ask

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to redeem by way of affirmative relief (13 *Barb.*, 629). The same doctrine is conceded in 22 *N. Y.*, 494. But the sheriff in this case does not set up in his answer, any claim for equitable relief, or ask to redeem. He places himself upon his replevin papers, and asserts that the *title at law* is in Hayes, the mortgagor. But even if the defendant had undertaken to redeem, by asking for affirmative relief in this action, he was too late, as the mortgage was already foreclosed upon notice, and the equity of redemption cut off before this action was commenced. Hayes should have commenced action to redeem, and stayed the foreclosure by injunction, and asked for an account to settle the amount unpaid.

V. The action in favor of Hayes was not commenced until after the Sheriff was informed that Miller was a mere agent, and that the plaintiff was the party. The Court therefore erred in charging that the action was commenced by a *bona fide* attempt to serve the papers (17 *How. Pr.*, 477). The Court properly charged, that the plaintiff has a right to sustain this action, if he is the owner of the property. Sec. 216 of the Code does not prevent the plaintiff from bringing this action. It provides a remedy by *claim*, instead of *action*, but the party may waive the claim and bring the action (*King v. Orser*, 4 *Duer*, 43).

A. J. Vanderpoel, for the defendants.—I. The Court submitted to the Jury the question as to the amount due upon the mortgage, and as to the sufficiency of the amount tendered; these facts having been determined in favor of the defendant, it follows, as a conclusion of law, that the lien of the mortgage upon the property was discharged, and the power of sale was gone. The creditor could from that time look only to the personal security of his debtor (6 *Wend.* 693, 608; *Kortright v. Cady*, *supra*; and cases cited; *La Motte v. Archer*, 4 *E. D. Smith*, 46; *McLean v. Walker*, 10 *Johns. R.*, 471; *Hunter v. Le Conte*, 6 *Cow.*, 728; *Pattison v. Hull*, 9 *Cow.*, 747; *Hinman v. Judson*, 13 *Barb.*, 629; *Charter v. Stevens*, 3 *Denio*, 33; *Parish v. Wheeler*, 22 *N. Y.*, 494; *Mason v. Sudam*, 2 *Johns. Ch. R.*, 172; *Pratt v. Stiles*, 17 *How. Pr.*, 211).

It was the right and duty of the Sheriff to take the property under the claim and delivery papers. In this respect, the case

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was fairly submitted to the Jury. No action will lie by plaintiff against the Sheriff, except under sec. 216 of the Code. This does not enable the plaintiff to maintain a suit, unless the Sheriff delivers the property to the plaintiff in the action.

But, if the plaintiff could have maintained an action, he abandoned and lost it by his withdrawal on the 15th of July, and before this suit was commenced.

There is no provision which authorizes or justifies the Sheriff in giving the property to the third party, when he interposes a claim under sec. 216 of the Code. He need not deliver the property to the plaintiff in the action, when such a claim is interposed by a third party, but the law does not allow a defendant thus to have his property taken from him at the suit of a plaintiff, and then delivered to a stranger to the action, without security. The defendant cannot indemnify against the claim of the third party, and yet the property can, on the plaintiff's theory, be taken from him and given to a third person, who does not give any security (*Edgerton v. Ross*, 6 *Abb. Pr.*, 189; *Dearman v. Blackburn*, 1 *Sneed* [Tenn.], 390; *Watkins v. Page*, 2 *Wis.*, 9).

III. The assignment of the mortgage to the plaintiff was taken with full notice of the previous assignment to Smith.

IV. None of the exceptions to the admissibility of the evidence were well taken.

BY THE COURT.*—ROBERTSON, J.—The plaintiff claims the property in controversy, by virtue of a sale thereof under an instrument of hypothecation of it executed by the original owners to a Mr. Thurber, held by the plaintiff as assignee thereof. At such sale an agent of the plaintiff, (Miller), bought such property and took possession of it for him, subsequently transferred it to him, and informed him he had done so. The original owner commenced an action and proceedings of claim and delivery for it after such sale, against Miller (the agent), out of whose manual possession the defendants as Sheriff and Deputy Sheriff took it, by virtue of the duly verified written claim, in such action, which was placed in their hands for service. Before the service of the summons, in such action, and the seizure of the property under such claim, the officer who served them was informed,

* Present ROBERTSON, WHITE and BARBOUR, JJ.

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that Miller claimed the property only as the plaintiff's agent. It was contended on the trial that such information prevented the defendants from justifying under the claim in such action, but how, was not clearly stated. It was now, however, urged that the action was not commenced until the actual service of the papers on Miller the agent, and that an instruction by the Court to the jury that a bona fide attempt to serve the papers was equivalent to a service for the purpose of commencing the action, was erroneous.

Two things would be necessary to make such charge erroneous. *First*, That the priority of the service of the papers to the giving of information of the plaintiff's claim should be material. *Secondly*, That an actual possession by one wrongdoer for the benefit of another, required a suit for the property to be brought against the latter in order to justify a seizure of it in the hands of the former under a claim.

There was no evidence that the property ever left the actual possession of Miller, until the service of the papers on him. The mere private recognition by him of a right in the present plaintiff, even if made after the sale but not notified to the defendants at the time of such service, clearly could not deprive the legal owner of the right of taking the goods out of the manual possession of the actual possessor in an action against him. Such a mere constructive change of possession might warrant an action against the principal, and the taking the possession away from his agent, (§ 209), but could not defeat the right of proceeding against the primary wrongdoer while still in possession. It therefore became immaterial to inquire whether the action was begun before the service of the papers or not; and consequently it is immaterial whether section 99 of the Code, is confined to the commencement of actions to save the statute of limitations, or whether, under sections 135 and 209, jurisdiction over the property, at least if in Miller's possession, was acquired by delivery of the papers to the defendant to be served.

The fifth request of the plaintiff to the Court, to charge that the defendants took the property wrongfully as against him, unless they took it out of Miller's possession, involves substantially the same question. But there was no evidence of any change of actual possession to the plaintiff by Miller before the service of the papers on him and the seizure of the goods. The sale took place, and the goods were seized by virtue of the claim

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and delivery papers, within a quarter of an hour of each other. Those papers had already been prepared with a blank for the name of the defendant in that action, were forthwith put in the present defendant's hands, and could easily have been served within that time. Miller did not execute a transfer to the plaintiff until half an hour after his own purchase. The person who was directed, in Miller's presence, to take possession of the goods, (Tillerton), did not do so. He only examined them as Miller's agent. There was in fact no evidence to go to the jury, of any change of even constructive possession of the goods from Miller to the plaintiff, before the service of the papers on the former, in the action against him.

The withdrawal by the present plaintiff, of the claim which he interposed in the action against Miller, so as to permit a delivery of the property to him, probably did not operate as a waiver of any claim under the 216th section of the Code. That section seems to have been intended simply for the protection of the sheriff in case he should deliver property seized in an action of claim and delivery to a plaintiff therein, and not in order to sanction its delivery to a defendant. Upon a claim by a third party, a failure by the plaintiff to give a proper indemnity, does not entitle such sheriff to *deliver* the property seized to such third party. He can merely *permit* the original defendant, from whose possession the property was taken, to *resume it*, by relinquishing it himself. The previous rule of the common law as amended by statute, justified an officer in delivering property to a plaintiff in an action of replevin after a sheriff's jury found it to be his (*Shipman v. Clark*, 4 *Den.*, 446; *King v. Orser*, 4 *Duer*, 431; *Edgerton v. Ross*, 6 *Abb. Pr.*, 189). The section in question dispenses with the necessity of such trial. There being no evidence in the case, as to what has become of the property, it must be presumed to have remained in the possession of the defendants since its seizure, which would be an unreasonable time to wait for indemnity from the plaintiff. The Court was therefore right in charging that the present plaintiff could bring the action if he had a right to the property.

The right of Mr. J. S. Smith to the possession of the goods in question in October, 1861, when the action was begun, if material, requires a fuller examination of the plaintiff's rights under the instrument of hypothecation executed by Hayes to Thurber, as

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well as its validity as security for any sum, and if valid, the amount.

That instrument was executed in July, 1860, to secure the payment by Hayes to Thurber of a certain sum. Before the 29th of October following, a judgment against Thurber for an amount sufficient to extinguish the debt secured by such instrument, was bought for a much smaller sum by Hayes against Vincent. The latter undoubtedly advanced the money on the 26th of October, 1860, to pay for it, but he testified that he first bought it, and afterwards agreed to let Hayes have it for the same price he paid for it. The latter swore he made the purchase; and another witness, (H. W. Smith), testified he negotiated it for him. Hayes executed a bill of sale for the property to Vincent on the day he borrowed the purchase money for the judgment, for a consideration exceeding it, but the amount of which was made up by legal expenses and small items. This was agreed to be security for the loan, until Thurber should assign to Vincent the instrument executed to him. The amount was to be repaid by weekly instalments.

These facts establish the advance by Vincent of the purchase money for the Thurber judgment; his contemporary agreement that in case he procured a transfer to himself of the instrument executed by Hayes to Thurber, he would relinquish to Hayes all his interest in such instrument upon being repaid the amount due him; while until such instrument was assigned to him, he was to hold as security for the repayment of his loan, the bill of sale of the 26th of October. The result of the whole transaction would then be, that the agreement by Vincent to assign to Hayes, the debt due by him to Thurber, as well as the instrument of hypothecation given to secure it, when carried out, would extinguish such debt. In equity it was an actual assignment by Vincent of it, conditional only while the bill of sale remained as security for the loan. After the assignment from Thurber to Vincent was completed, the instrument held by the former was to take the place of the bill of sale as security for the loan by the latter to Hayes. Thus instead of being a security for the amount due to Thurber, it became at most only one for the smaller sum due to Vincent. He understood it to be so, and accordingly informed the plaintiff's agents at the time they purchased it, that only a certain sum was due on it;

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being equal to the amount advanced by him less subsequent payments.

In February, 1861, while Vincent held both the instrument executed to Thurber and the bill of sale, which appears never to have been cancelled, Hayes borrowed of Mr. J. S. Smith a certain sum which he paid to Vincent on account of the money due him. He gave Smith his note for the amount borrowed at sixty days, for the payment of which Vincent assigned to the latter the original instrument executed to Thurber as security. In April, 1861, after the note became due, before this action was commenced, and while the property pledged was still in possession of the defendants, Smith claiming to act by virtue of the instrument executed to Thurber and its assignment by the latter to Vincent, bought in the property at a sale conducted by himself by way of foreclosure.

This action was commenced in October, 1861. By the assignment to Smith by Vincent of the instrument executed by Hayes to Thurber, he (Smith), became the mere pledgee of the debt secured by it; and if the entire legal title to it was thereby so transferred to him, as to enable him to foreclose any right of redemption under it and take possession of the chattels transferred thereby, and sell them, he would still be *trustee to Vincent or his assigns* of the residue of the proceeds of any sale, after deducting enough to satisfy his own claim, or if the chattels were bought in by him he would be trustee of the chattels themselves. Such transfer to Smith, being the mere mortgage of a debt, and of an accompanying pledge given to secure it, did not need to be recorded any more than an absolute assignment of such mortgage, the Statute of this State on the subject extending to mortgages of goods and chattels only and not choses in action (*N. Y. Sess. L. 1833, ch. 279*).

Under these circumstances it appears to me that the power of Vincent to transfer the mortgage held by him to the plaintiff, after its transfer to Smith, so as to enable the former to sell the mortgaged property without the assent of the latter, depends entirely upon the question whether the assignment to the latter was a pledge or a mortgage. The leading difference between these two kinds of transfers is, that the former is security for the payment of a debt, and the latter is a *conditional sale* which becomes absolute by nonperformance of the condition, which requires payment of a specified sum at a fixed day (*Butler v. Mil-*

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ler, 1 *N. Y.* [1 *Comst.*], 496). So much so, that on default, although the mortgagor's interest if in possession may be levied on and sold to the extent of his right to possess them, the chattels themselves cannot be sold on execution against him (*Stewart v. Slater*, 6 *Duer*, 83, 96). After default the mortgagee's interest may be sold on execution against him (*Ferguson v. Lee*, 9 *Wend.*, 258). Even a grant of a power to sell, and return the surplus beyond the specified sum, does not alter the character of the instrument (*Dane v. Mallory*, 16 *Barb.*, 46, *Burdick v. McVanner*, 2 *Den.*, 170). Even, however, in case of a mortgage, the mortgagor has a right to perform the condition, where it is the payment of money, at any reasonable time after that specified in it (*Pratt v. Stiles*, 17 *How. Pr.*, 211, *S. C.*, 9 *Abb. Pr.*, 150), and he may even reduce the damages in an action against him by the mortgagee for conversion of the mortgaged property to the amount specified in such mortgage (*Hinman v. Judson*, 13 *Barb.*, 629), although this is said in *Parish v. Wheeler* (22 *N. Y.*), to be on the ground of avoiding circuity of action. Or he may recover damages for any of it sold by the mortgagee under a power of sale beyond enough to pay the amount mentioned in the mortgage (*Charter v. Stevens*, 3 *Den.*, 33). This right of performance of a condition subsequent, called sometimes an equity of redemption, may be cut off by a sale on reasonable notice or enforced by an action (*Patchin v. Pierce*, 12 *Wend.*, 61).

One test whether a transfer of property is a pledge or a mortgage is, whether a debt exists independent of it, for the payment of which it is security (*Langdon v. Buel*, 9 *Wend.*, 80), in which case it is the former. A pledge of property capable of physical delivery, requires that it should be so delivered (*Barrow v. Paxton*, 5 *Johns.*, 258; *Cortelyou v. Lansing*, 2 *Cai. Cas.*, 200). Property not capable of such delivery may be pledged in writing (*Wilson v. Little*, 2 *N. Y.* [1 *Comst.*], 443). The transfer of choses in action as mere security for a debt is always a pledge. (*Wheeler v. Newbould*, 16 *N. Y.*, 392; *M'Lean v. Walker*, 10 *Johns.*, 471; *Garlick v. James*, 12 *Id.*, 146; *White v. Platt*, 5 *Den.*, 269). When so received, without special authority the pledgee cannot sell them (*Wheeler v. Newland*, *ubi sup.*; see *Brown v. Ward*, 3 *Duer*, 660), or compromise them (*Garland v. James*, *ubi sup.*); he can only wait till they mature and collect them (*Wheeler v. Newland*, *ubi sup.*)

In the present case the assignment to Smith is as clearly a

pledge of the mortgage or pledge from Hayes, assigned by Vincent, and not a mortgage or *conditional sale*. If he could sell that mortgage and the debt it secured, on notice and buy it in, he might then become assignee of it, and entitled to collect it by notice and sale of the chattels or by an action. Until he did so, however, the plaintiff as an assignee of the mortgage by Hayes subject only to the special property in Smith which the pledge created, and for an injury to which he could only recover to the extent of his lien (*Brownell v. Hawkins*, 4 *Barb.*, 491,) might proceed to foreclose and sell under such mortgage, and no one could object except Smith. Certainly Hayes could not.

The charge of the Court that the transfer to the plaintiff was subject to the rights of Smith even if he had notice of them as an abstract proposition was correct (*Muir v. Schenck*, 3 *Hill*, 228 ; *Poillon v. Martin*, 1 *Sandf. Ch.* 569 ; *Sweet v. Van Wyck*, 3 *Barb. Ch.*, 647), and, therefore, this third request to charge that "the plaintiff's rights were prior to Smith's, and not affected thereby," would have been properly refused if material.

The Court charged more favorably for the plaintiff, and gave him all he asked by instructing the jury that no right or equity of Smith's interfered with the plaintiff's right to pursue his remedy on the mortgage for his interest in it, and if he had acquired a good and valid title to the mortgage he had a right to go on and foreclose it.

The second request to charge "That the defendants were not entitled to defend under Smith a judgment as against the plaintiff," was therefore fully met in substance. The principle involved was, who had the better title or superior right so far as this action was concerned, and it was immaterial whether that was announced by stating that the plaintiff had it, whatever Smith's rights were, or that Smith, under whom the defendants claimed, had none as against the plaintiff.

The last question on the merits arises from exceptions to a refusal to charge as desired by the first and fourth requests to charge. The former was "that the tender made by Smith to West could have no effect, and did not impair the plaintiff's right under the mortgage." And the latter that it was wholly immaterial what sum was to be paid by Hayes, as long as he did not pay or commence an action to redeem before foreclosure. The amount due to Vincent on the mortgage to Thurber when he assigned it to the plaintiff, did not exceed \$1035. The sum

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tendered was \$1055. The only pretence that it was not sufficient was that the constable claimed the extravagant sum of \$155 for commissions which was not chargeable against the mortgagee. It did not appear that the extra twenty dollars was not sufficient to cover expenses and interest, or that any objection was made to the amount. The question of the amount due was left to the jury.

But it is claimed that the plaintiff had a right to complete his foreclosure in pais, and sell after a tender of the amount due, and that the owner's only remedy was to commence an action to redeem. It is contended that there is a distinction between mortgages of real and those of personal property in that respect. It was finally settled in *Kortright v. Cady*, (21 *N. Y.*, 343), in the Court of Appeals, that a tender of an amount due on a mortgage on land, even after the law day, if refused, destroyed the lien of it on the land. By giving the mortgagor the right to redeem, by rendering him only liable for the amount to be paid, in case of his conversion of the property, and by making the mortgagee liable for any sales beyond the amount of his mortgage (*Harriman v. Judson*, *Charter v. Stevens*, *ubi sup.*), it would seem to have become a mere security for money. It is true that in the case of *Butler v. Miller* (1 *N. Y.* [1 *Comst.*], 496), the Judge who delivered the opinion of the Court notices the distinction between mortgages of real and personal estate, and states that the latter is a sale, and operates to transfer the whole legal title of the thing mortgaged to the mortgagee, subject only to be defeated by a full performance of the condition. It was not necessary for the decision of that case, but some respect is due to even an obiter dictum in the Court of highest resort when relying on distinctions so drawn. It has been held that after forfeiture, no tender can revest the title in the mortgagor, and even that acceptance of part is no waiver. But there are authorities to the contrary (*Jenkins v. Jones*, 2 *Giffard's R.*, 99; *Patchin v. Pierce*, 12 *Wend.*, 61).

Such distinctions, however, between mortgages of real and personal estate cannot prevail in case of a pledge, which is settled to be a mere security, conferring only a special property in the property pledged (*Brownell v. Hawkins*, *ubi sup.*) for any fall of value in which, after a tender, the pledgee is responsible (*Griswold v. Jackson*, 2 *Edw.*, 641), which would not be the case if a bill to redeem was necessary. The interest of the pledgee

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is in fact a mere lien, like a mortgage of lands, and should be relieved by the same process. The reasoning in the case of Kortright v. Cady, before cited, is equally applicable to pledges, and must govern this case.

The only question, therefore, which remains, is, whether the instrument executed by Hayes to Thurber was a mortgage or a pledge, or became so by the agreement of Hayes and Vincent. It recites that it was executed "for securing the payment of the money thereafter mentioned," and its condition was to be void on payment of the sum of \$3795, *on demand*. It contains an authority, in case of non-payment, to take possession of the goods and sell them for the best price, and out of it pay the amount before mentioned, and all charges, and return the overplus to Hayes. The recital as to the object of it would not render the mortgagor personally liable (*Culver v. Sisson*, 3 *N. Y.* [3 *Comst.*], 264), unless he converted the property (*Weed v. Covill*, 14 *Barb.*, 242). This doctrine seems contrary, however, to the case of *Case v. Boughton* (11 *Wend.*, 106), which treats the sum mentioned in the condition as a debt. The power of selling, also, and restoring surplus moneys, seems not to defeat the absoluteness of the title on default (*Dane v. Mallory*, *Bendick v. McVanner*, *ubi sup.*). Possibly under these decisions such original instrument was only a mortgage. But by the agreement between Vincent and Hayes, as the latter testified, he borrowed of the former the money to buy the judgment against Thurber. The former charged it against Hayes in his books. He claimed it as a debt due him; and a note taken at the same time was agreed to be applied on it when collected. There was nothing to prevent his suing Hayes for such debt if not paid on demand. The original instrument, therefore, had lost its character, if it ever had it, as a mortgage or conditional sale, and became by the oral agreement of the parties a mere pledge to secure a debt. Upon the payment by Hayes of his debt to Vincent at any time, the lien on the chattels mortgaged was gone. If there was any conflict of evidence on this point, there was no request that it should be left to the jury. The request was peremptory that the tender was of no avail, and did not contain a hypothetical case; and therefore in order to sustain the refusal, any state of facts, which the evidence would warrant, may be assumed to exist in this case. The refusal of the Court, therefore, to charge as requested was not erroneous.

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An exception was taken to the admission of the assignment to J. J. Smith in evidence after objection, but this was clearly admissible on the question of damages, if the plaintiff were entitled to recover. His rights were subordinate to, but not destroyed by Smith's, who might equally have a right of action against the defendants for converting his property or securities. Both clearly could not have a right of action for the *same injury*, and there was no privity between Smith and the plaintiff, so that the former would be entitled to the benefit of any recovery in this case by the latter. Besides this, Smith has foreclosed his mortgage, and sold the property adversely to the plaintiff; that possibility the jury had a right to take into view in assessing damages, unless they were limited to deducting the amount due Smith from the value of the goods. Of course, the fact that the verdict of the jury was in favor of the defendants, does not render the reading of the assignment to Smith in their hearing unwarranted. The Court instructed them, notwithstanding, that the rights of the plaintiff were paramount, and no request was made as to damages.

There being no error in the admission or rejection of evidence, or the facts of the charge or refusals to charge which were excepted to, judgment must be given for the defendants, with the costs of the trial and the hearing of the exceptions.

HATCH *against* WOLFE.

New York Common Pleas; General Term, June, 1865.

COVENANT.—CAUSE OF ACTION.—REFERENCE.—APPEALABLE
ORDER.

An action, brought against an out going lessee, to recover the amount laid out in putting a house in repair under a covenant on his part in the lease to leave the premises in good order, is an action upon the covenant and not an action in tort.

Where such an action involves the examination of a long account it may be referred.

An order directing a reference in such a case is not appealable.

Appeal from an order of reference.

The defendant, Bernard Wolfe, hired a dwelling house of the plaintiff, covenanting to leave the premises in good order at the end of the term, ordinary wear and tear excepted. He left it in bad order; the plaintiff, Roswell D. Hatch, Recr., &c., had it put in a tenantable condition, and brought suit to recover the amount so laid out. On joining issue, plaintiff moved for a reference, alleging that the examination of a long account would be necessary—this being granted, the defendant appealed from the order to the General Term.

Wm. H. Newman and *D. M. Porter*, for the appellants.—

I. The action cannot be maintained except as an action for damages. It is not an action for an accounting, neither is it an action on an account. The plaintiff's cause of action, is for a wrong (a misfeasance or negligence in permitting the property to be destroyed). Such an action is not referable, although it may be necessary to examine a large number of items constituting the plaintiff's claims for damages (*McMaster v. Booth*, 4 *How. Pr.*, 427). Where there is no account in the ordinary sense of the term, the cause cannot be referred (*Van Rensselaer v. Jewett*, 6 *Hill*, 373). The defendant, as has been said, is sought to be charged for wrongfully permitting the property to be destroyed. Actions for *torts* are not referable (19 *Wend.*, 108).

II. An account in the ordinary acceptation of the word can alone be compulsorily referred (*M'Cullough v. Brodie*, 13 *How. Pr.*, 346; *Cameron v. Freeman*, 18 *Id.*, 310).

Can these items of damage in this action be held to be an account in the ordinary sense of the word?

An account in the ordinary sense of the word implies a contract between the parties relating to the particular demand and out of which it arises; here the plaintiff has gone on, and made what he alleges to be certain repairs and improvements because of the defendant's alleged negligence without the knowledge or consent of the defendant. Can such a statement constitute an account; if so, an assault and battery could do so, and the plaintiff make up a long bill of particulars for so many buttons destroyed, repairing pantaloons, and so on, by reason of the assault, &c., and get a reference.

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III. A difficult question of law is sworn to by the defendant and specified in his affidavit, Code 271.

IV. The answer denies the defendant's liability (*Van Rensselaer v. Jewett, ubi supra*).

V. There is no account between the parties, but merely alleged items laid out to repair the effects of the defendant's carelessness and negligence. The right of trial by jury should be held inviolate, and there are especial reasons why this is a cause for a jury.

Roswell D. Hatch, for respondents.—I. An order of reference is not appealable (*Gray v. Fox*, 1 *Code R.*, *N. S.*, 334; *Bryan v. Brennon*, 7 *How. Pr.*, 359; *Dean v. Empire Ins. Co.*, 9 *Ib.*, 69; *Tallman v. Hinman*, 10 *Ib.*, 89; *Ubsdell v. Root*, 1 *Hilt.*, 173; *Baker v. Nausman*, 1 *Hilt.*, 546; *Conlan v. Latting*, [*Woodruff, J.*], 3 *E. D. Smith*, 353).

II. Under the broad provision of the Code (§ 271), a reference may be ordered in *any* action if the trial will require the examination of a long account.

The Code is broader than the Revised Statutes. By the latter the Court could only refer where the action was "founded on contract" (2 *Rev. Stat.*, Vol. 2, p. 480, 3d Edition).

Under the Code there is no restriction, and any action, even one founded on *fraud*, may be referred (*Sheldon v. Wood*, 3 *Sand.*, 739). On a motion for a provisional remedy, the Court may direct a reference to hear and decide the issues in the action (*Jackson v. De Forest*, 14 *How. Pr.*, 81). A reference can be compelled where the Court can see that the trial *must necessarily* involve the examination of a long account (*Keeler v. Pough. Pl. R.*, 10 *How. Pr.*, 11; *Sheldon v. Weeks*, 7 *N. Y. Leg. Obs.*, 57; *Conlan v. Latting*, 3 *E. D. Smith*, 353; *Bowman v. Sheldon*, 1 *Duer*, 607; *Masterton v. Howell*, 10 *Abb. Pr.*, 118; *Mills v. Thursby*, 11 *How. Pr.*, 113).

In an equitable action to set aside a conveyance on ground of *fraud*, the Court in its discretion ordered the issue to be tried by a referee where the Circuit Calendar was crowded (*M'-Mahon v. Allen*, 10 *How. Pr.*, 384). The question whether the trial of an issue of fact will require the examination of a long account is a question to be determined summarily upon application to refer (*Dean v. Empire Mut. Ins. Co.*, 9 *How. Pr.*, 69). The allegation in the moving affidavit, made by the attorney,

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that the trial would necessarily involve the examination of a long account, is sufficient to authorize the Court to order a reference, and such order is not appealable (*Ibid*).

III. The authorities cited from Wendell by the appellant were before the Code and under the Revised Statutes, and not applicable to the present system.

IV. There are 46 items, separate and distinct, different bills, paid to various mechanics in putting the premises in order. It would be impossible for a jury to recollect them, unless by taking notes of reference.

BY THE COURT.—DALY, F. J.—This is not an action for a *tort*, but for the breach of a covenant to keep the premises which had been demised to the defendant in good and tenantable repair, and the order directing a reference, upon the ground that it required the examination of a long account, is not an order affecting the merits, or which involves a substantial right, and is not appealable (*Dean v. Empire Mut. Ins. Co.*, 9 *How.*, 69; *Bryan v. Brennon*, 7 *Ib.*, 359; *Ubsdell v. Root*, 7 *Hilt.*, 173).

Even before the Code there might be a reference in an action of covenant, if the examination of a long account were involved (*Diedrick v. Richly*, 19 *Wend.*, 110; *Bloom v. Potter*, 9 *Wend.*, 40; *Thomas v. Reab*, 6 *Wend.*, 50). And if the action is one in which a reference may be ordered, the order of the Judge at the Special Term, upon the question, whether the examination of a long account is or is not involved, is not one which the Court will reverse on appeal (*Smith v. Dodd*, 3 *E. D. Smith*, 348; *Kennedy v. Hilton*, 1 *Hilt.*, 546).

Defendant's appeal dismissed.

BRADY, J. dissented.

TOWLE *against* PALMER.*New York Superior Court; General Term, December, 1863.*PRE-EMPTIVE RIGHTS.—COLLATERAL INQUIRY INTO BREACH OF
PROVISO.—CONDITIONS.—ADVERSE POSSESSION.—EVIDENCE.

The proviso in the Act of April 3, 1807, by which it is declared that the proprietors of lands adjacent shall have the pre-emptive right in all grants made by the Corporation of the City of New York, of the lands under water in the Hudson River granted to the city by that Act,—is a mere restraint on alienation, which can be waived by the original grantors, the State; and does not confer any legal right to, or interest in, such lands under water, upon the proprietors of the adjacent uplands.

For a breach of the proviso, by the act of the corporation in granting to one who is not the true owner of the adjacent upland, the State, only, can re-enter; and until it does so, such a grant cannot be annulled in a collateral inquiry.

In determining whether a condition in a deed is precedent or subsequent, the main test is whether the vesting of the estate granted by the instrument containing it, is postponed until the happening of the contingent event forming the condition, or is to be divested by it.

Where a municipal corporation, owning lands under water, in which the proprietors of adjacent upland had by law a pre-emptive right, granted the same to persons claiming to be such proprietors, by a deed which bound the grantees to pay an annual rent, with a right of distress and re-entry by the corporation, on default, also bound the grantees to fill in and construct streets, &c., with a right of re-entry by the corporation, on default, with a further clause declaring that the deed and the estate granted were upon the condition, that, if at any time thereafter it should appear, either that the grantees were not at the date of the grant, proprietors of the upland, or if they should make any default in performance of their covenants, the grant should be absolutely null and void, and the grantors might re-enter, &c ;—*Held*, that this created not a precedent but a subsequent condition, as well as to the proprietorship of the uplands as respecting the performance of covenants; and upon its subsequently appearing that the grantees were not the true proprietors of the upland, their title was not divested so as to enable the true proprietor, on receiving a subsequent grant from the corporation, to recover the land from the first grantees, without the aid of any proceedings by the corporation or the State to annul the first grant.

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Notwithstanding the pre-emptive right, the corporation could make such first grant, subject to be divested by State action, and could not convey their right of entry for a breach of the condition. (Bosworth, Ch. J., dissented.)

Where different parties claim the same premises under conflicting grants from the same source, each grant being upon condition that the grantee is the true owner of adjacent lands, possession under such grant by the one who was not the true owner of the adjacent lands, cannot be deemed adverse so as to ripen into a title as against the other.

In an action by the true owner of the adjacent lands, to recover the premises granted, evidence of his recovery of the adjacent lands against third persons, is not irrelevant, he being required to establish his title independently of such recovery. Per Bosworth, Ch. J.

Appeal by the defendants from a judgment entered on a verdict against them.

This action was brought to recover a part of a lot of land on the north side of Twenty-fifth street, in the city of New York, 475 feet west of the Tenth Avenue, which the plaintiff claimed in fee, alleging that the defendants pretended to claim some right thereto, but their claim was unlawful. The defendants were Jacob A. Palmer and Isaac E. Smith, the latter of whom was a tenant holding under the former.

The cause was tried on the 16th day of December, 1861, before Mr. Justice MONCRIEF and a jury. The land lay originally in the Hudson River, 396 feet west of high-water mark, and 271 feet west of low-water mark. Both parties claimed under conflicting grants by the Corporation of the city of New York, which resulted from a controversy as to the title of two lots upon the original bank or upland, in front of which the premises now in question lay. These two lots, designated in these proceedings as Nos. 117 and 118, were formerly the property of one Mary Clarke. The plaintiff claimed under various mesne conveyances from Thomas B. Clarke, a beneficiary named in her will. The defendants claimed under her heirs, who were also devisees under the will. The title had long been in litigation. The plaintiff, after giving in evidence the deeds under which he claimed the two upland lots, proved that in 1849 he brought an action in this Court, against one John Farney, to recover lot 118, who held the same under the heirs and devisees, and who appeared and set up that claim as a defence in the action; and that the plaintiff recovered judgment declaring the title to be in him,

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and awarding him possession ; and that on appeal this judgment was affirmed by the Court of Appeals, and had been duly executed by putting the plaintiff in possession. These facts were proved by the judgment roll in that action, which was admitted in evidence against the objection and exception of the present defendants. In the same manner the plaintiff was allowed to prove a like recovery from Cortlandt Wood, of lot No. 117, which had been claimed by him under the same heirs and devisees.

He also read in evidence the statute of April 3, 1807, by which the State of New York granted to the city of New York certain lands under water in front of this bank of the Hudson, "provided always that the proprietor or proprietors of the lands adjacent shall have the pre-emptive right, in all grants made by the corporation of the said city," in such lands under water. He also read the Acts of February 5, 1826, and of April 12, 1837, of similar character. And he put in evidence a grant to himself from the City Corporation, dated November 29, 1859, and conveying premises described as water lot and vacant ground or soil to be made land, which included the lot in question in this action. He also produced another instrument executed by the Corporation, reciting that they had previously granted water lots, including these premises, to the heirs of Mary Clarke, and that the plaintiff had represented that he had established his title thereto, and releasing and quit-claiming them in consideration of payment of a gross sum in lieu of rents.

The defendants, to prove title in Palmer, put in evidence the previous conveyance by the city to the heirs of Mary Clarke, which included the premises in question. This deed was dated March 31, 1837 ; and the city and the heirs were the only parties thereto. It reserved certain annual rents to the city, with a right to distrain or to re-enter for non-payment. The grantees covenanted also to fill in the parts of the water lot necessary for the streets, at their own expense, whenever required by, and according to the directions of the city. The city also covenanted that the grantees might enjoy the wharfage from the water front lying between the streets as extended. After these provisions the deed contained the following clauses :

"And it is hereby further covenanted and agreed by and between the said parties to these presents, and the true intent and

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meaning thereof is hereby declared to be, that this present grant, or any words, matter, or thing in the same contained shall not be deemed, construed, or taken to be a covenant or covenants of warranty or seizin of the said parties of the first part, or their successors, nor to operate further than to pass the estate, right, title, or interest they have or may lawfully claim by virtue of their several charters and various acts of the Legislature of the People of the State of New York ; and it is further expressly understood and agreed, and these presents and the estate hereby granted, are upon this express condition, that if, at any time hereafter, it shall appear that the said parties of the second part were not, at the time of the date of these presents, seized of a good, sure, absolute, and indefeasible estate of inheritance in fee simple of, in, and to the lands and premises on the easterly side of the line of high water, and adjoining to the water lot and ground under water hereby conveyed, or so intended to be ; or if the said parties of the second part, their heirs, executors, administrators or assigns, shall make default in the performance of any or either of the covenants above contained on their part and behalf to be observed, performed, fulfilled, and kept ; then, and in every such case, these presents, and every article, clause, and thing herein contained, shall be absolutely null and void, and the said parties of the first part and their successors shall, and may forthwith thereupon enter into and upon the said premises hereby granted, and shall thereafter be seized of the said premises, with the appurtenances, free, clear, and discharged of and from any claim, right, or pretence of claim or right, of the said parties of the second part, their heirs or assigns, anything herein contained to the contrary notwithstanding."

The defendants gave evidence tending to show that upon the execution of the said grant of March 31, 1837, the grantees therein named entered into the possession of the premises thus granted under claim of title, exclusive of any other right, founding such claim upon the said grant, and built a bulkhead on the Eleventh Avenue, and filled up the space between the same and the original shore, and that they have been in continued occupation and possession of the said premises under such claim ever since, by themselves and grantees, and had conveyed the lot in question to the defendant, Isaac E. Smith, who had let the same to the other defendant, Jacob M. Palmer.

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The Court instructed the jury, among other things, that the Acts of 1807 and 1826 and 1837, gave to the Mayor, Aldermen and Commonalty of the city of New York a fee to the land in question, with a limitation as to disposal ; and that any grant or disposition thereof by the Mayor, &c., contrary to, or in contravention of, the terms of such limitation, was absolutely void, and the grantees thereby would take no interest or estate whatever. And that if the heirs under whom defendants claimed were not the legal owners of the upland lots 117 and 118 in 1837, the Corporation grant to them was void in its inception, except that it gave a qualified possession or license to enter, and passed no estate or interest whatever to the land in question.

In regard to the title of the plaintiff to those lots, he stated that ;—if they found him to be owner they must do so irrespective of any decree or judgment in the case of *Towle v. Farney* ; he must prove his title in this suit to the lots Nos. 117 and 118, precisely the same as he was required to do in that case. And as to the question whether the defendants had not made out an adverse possession for twenty years ;—that, if they went into the possession of the premises in question under the grant to them in the year 1837, by commencing to fill up the land immediately in front of lots Nos. 117 and 118, covered by water, and progressed without any interruption, and had been in that possession from the 24th of February, 1840, they would be entitled to a verdict. But if they commenced to fill up in 1837, and ceased or abandoned the work, then that possession would not be such as the law requires to give them title by reason of holding adverse possession.

The defendants excepted to the first and third of the points above stated in the charge. The jury found a verdict for the plaintiff ; and judgment having been entered thereon the defendants appealed.

David Dudley Field, for the defendants, appellants.—I. The first and second exceptions to evidence relating to the two judgments were well taken.

The judgment rolls in actions between the plaintiff and third persons could not possibly bind the defendants in this action.

II. It was error to charge that the grant of 1837, was void ; not only upon the true construction of the statutes, but because not being void on its face, the court could not pass

on that question in this action (*Nott v. Thayer*, 2 *Bosw.*, 10; *Jackson v. Lawton*, 10 *Johns.*, 23; *People v. Mauran*, 5 *Den.*, 389, 399). The validity of a patent or grant, which is matter of record, cannot be questioned in a collateral proceeding. The rule is founded upon the principle that a record cannot be overthrown except by the judgment of a Court on an issue upon the precise question of its validity (*People v. Mauran*, 5 *Den.*, 389; *Bledsoe v. Well*, 4 *Bibb*, 329; *Jackson v. Lawton*, 10 *Johns.*, 23; *Jackson v. Marsh*, 6 *Cow.*, 281; *Bagnell v. Broderick*, 13 *Pet. S. Ct.*, 436; *Jackson v. Hart*, 12 *Johns.*, 77).

III. The grant to Bayard Clarke and others vested the title in them, subject to be defeated by the condition subsequent, in respect to what might afterwards appear on the subject of the title to the upland (4 *Kent's Com.*, 4, 125; 2 *Blackst. Com.*, 154; 1 *Washb. on R. P.*, 446; *Finlay v. King*, 3 *Pet. S. Ct.*, 343; *Underhill v. Saratoga R. R. Co.*, 20 *Barb.*, 455; *Nicoll v. N. Y. & Erie R. R. Co.*, 12 *N. Y.*, [2 *Kern.*], 121; *Armstrong v. Carson's Exors.*, 2 *Dall.*, 317; *Rogan v. Walker*, 1 *Wisc.*, 133; *Phelps v. Chesson*, 12 *Ired. [Law]*, 199).

N. Dane Ellingwood, for the plaintiff, respondent.—I. The grant from the corporation to the heirs of Mary Clarke is, in effect, a grant of an estate in fee, limited upon a condition precedent. 1st. It clearly was not the intention of the grantors to vest any estate whatever in the grantees, unless they were, at the time of the making of such grant, the owners of the upland. 2d. This was made, expressly, the condition of the grant, and it conforms with the restriction contained in the grants from the State to the grantors (Act of 1807, § 15, *Davies' Laws*, 434). 3d. The words, "If at any time hereafter it shall appear," used in the grant, do not make the condition, itself, any less a condition precedent. (a.) The condition was that the grantees were, at the time of the making of the grant, the owners of the upland. If this were not true (whether such fact was known or not at the time of the making of the grant) the grant was void at its inception. (b.) It was not the subsequent discovery that constitutes the breach of the condition; the breach consists in the fact that the grantees were not, *at the time of the making of the grant, the owners of the upland.*

II. If the grant be deemed a conveyance in fee, limited

upon a condition precedent, and if the fact be, that the grantees were not, at the time of the making of the grant, the owners of the upland, then no estate, whatever, was vested in the grantees under such grant (2 *Bro. C. R.*, 456, 441; 1 *Vernon*, 83; 2 *Vernon*, 333; 5 *Viner*, 87; 4 *Kent's Com.*, 8th ed., 129.)

III. Supposing that a void deed can be made the basis of an adverse possession, a party claiming title by possession, must not only show that such possession was adverse in its character, at the time of the execution of the grant under which he claims, but also that such possession was continuous and uninterrupted.

IV. The charge was correct as to the effect of the statute, and the validity of the grant to the heirs of Mary Clarke, and as to the adverse possession.

V. The records in the cases of *Towle v. Farney* and *Towle v. Wood*, were properly admitted in evidence. 1st. These records were not introduced for the purpose of concluding the defendant, but as tending to show that the grant to the heirs of Mary Clarke was void, and also to show *the time when* the title to the upland was first brought in question. 2d. The Court, in the charge to the jury, directed them to find the title to the upland, irrespective of those records.

BY THE COURT.—ROBERTSON, J.—The plaintiff is bound to make out one or more of the following principles to entitle him to recover in this action.

1st. That the proviso in the Statute of 1807 (Laws relating to City of New York, 434, § 15 [Davies],) under which the Corporation of the City of New York derived title to the lands in controversy, requiring them in case of any conveyance of such lands, to recognize a pre-emptive right in the owners of the adjacent upland, operated not merely as a partial restraint on alienation by such Corporation, but conferred some new positive indefeasible right to, or interest in, such lands, upon such owners of such upland.

2d. That according to the legal interpretation of the language of the grant to the heirs of Mrs. Clarke, the condition therein contained defeating it, in case they should not prove to be the owners of the upland, was precedent and not subsequent to the vesting of any estate by virtue thereof.

3d. That the right of forfeiture and re-entry, in case such con-

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dition were determined so as to defeat the estate conveyed by such grant, could be transferred by such city corporation to those under whom the plaintiff claimed.

I omit to inquire, as unnecessary for the present, whether the subjection of the grant to such corporation, by the statute before mentioned, to a right of pre-emption by riparian owners in case of alienation by the former, would convert the condition in such Clarke grant into a precedent one; although not made so by the terms of the instrument itself, construed according to their legal import and effect, or would render the grant itself absolutely void because not made subject to such a condition precedent. The principles already stated require first to be disposed of, as, if the adjacent riparian owners had no right available in law by them, in their own names, or if the condition before mentioned was subsequent, and the right of re-entry for its happening could not be conveyed by the city corporation, the plaintiff could not recover.

As to such first principle, it is to be observed that the People of the State of New York could grant lands absolutely or conditionally, by an act of the Legislature directly, or by an agent authorized under such an act: that in case of an absolute grant, the Legislature could not repeal such act so as to avoid such grant: and that in case of a conditional grant it would only re-enter by proceedings taken to annul such grant (*People v. Mauran*, 5 *Den.*, 389; *Williams v. Sheldon*, 10 *Wend.*, 654; *Jackson v. Marsh*, 6 *Cow.*, 281; *Jackson v. Lawton*, 10 *Johns.*, 22; *Sawe v. Hart*, 12 *Johns.*, 76; *Bledsoe v. Well*, 4 *Bibb*, 329; *Bassell v. Broderich*, *supra*;) unless in case of a condition precedent. Thus grants of land under water by the Commissioners of the land office in all other parts of the State except the City of New York, are declared by statute to be void unless made to the owners of the adjacent upland (1 *R. S.*, 208, § 67) in order to accomplish that specific result. Prior statutes on the subject, differed therein from such statute (2 *Rev. notes*, p. 29; 1 *N. Y. L. [Greenl.]*, 284, § 18; 1 *L. N. Y.*, [*K. & R.*] 299, § 11; 1 *R. S.* 292, § 4); and received a different construction judicially, (*Champlain and St. L. R. R. Co. v. Valentine*, 19 *Barb.*, 484); and a prior statute not containing such express provision avoiding a grant, but one similar to the statute under consideration, was also differently construed, in a case (*People v. Mauran*, *ubi sup.*) where an attempt was made to impeach collaterally the validity of a

grant by the Commissioners of the Land office, by showing that the grantor was not owner of the adjacent upland.

The well known mode, in a statute, of restraining, or qualifying a right previously granted by a *proviso*, cannot be used to extend one, particularly when it immediately succeeds the grant intended to be restrained or qualified (*Dwar-is on Statutes*). And it is very evident that the *proviso* under consideration could not take or have any effect while the City Corporation should continue to hold the property granted, even if perpetually. During the term the land under water was so held, the upland might pass through a hundred hands, be subdivided into numerous parcels, and each be held by different, intricate and embarrassed titles. No title to the land under water would follow such changes of right to the upland, but a mere possibility, only available in case the City Corporation undertook to alienate the former, and to be protected by proceedings to annul the prohibited grants. There is nothing to prevent a repeal by the Legislature of the proviso in reference to grants by the City Corporation of lands under the statute of 1807, so as to leave the latter free to grant them to whomsoever they please. It is a mere restraint of alienation which can be waived by the original grantors, *the State*; and is possibly valid because limited to particular grantees. If the State had intended to carry out a settled plan or policy to favor riparian owners in the grant of adjacent lands under water, to be carried out by a municipal corporation within whose jurisdiction they might lie, they would have vested some right or definite interest in such riparian owners, and not merely have reserved a well known common law right to themselves, to divest the grantees of such lands from such Corporation of their right, by legal proceedings. It would be dangerous, therefore, to conclude that because the Legislature has shown some inclination to favor adjacent riparian owners, they necessarily must have conferred on them a legal right.

No case has been pointed out to me, nor have I been able to find any, in which the reservation by a grantor, whether a public body or an individual, of the right of annulling a grant by his grantor of lands, in case the latter did not give a preference to certain designated persons, could be recognized in a court of law at the instance of such preferred persons. Definite rights or even good will in the pre-emption of lands given to such pre-

ferred persons are so cognizable (*Armour v. Alexander*, 10 *Paige*, 571; *Craig v. Tappin*, 2 *Sandf. Ch.*, 78; *Lytle v. The State of Arkansas*, 9 *How. S. Ct.*, 314); but not in case of a mere reservation to a grantor. The State clearly has a right to reenter for breach of the proviso, and hold, as it originally held, the lands so reentered upon; and the upland owner could have no right as against it. I am satisfied thus far, that none of those under whom the plaintiff claimed derived any title to the lands in question from their riparian ownership of adjacent lands, cognizable in a Court: that for the breach of the proviso in the Statute, the State only could reenter, until which time no grant by the City Corporation could by virtue of anything contained in the Statute of 1807 be annulled in a collateral inquiry. It is not necessary to recur to the mischievous consequences of giving a different effect to such statute in regard to land in the City of New York of great value, with intricate and confused titles, including the unavoidable retardations of the objects proposed to be gained by such statute as therein recited, preferring to rely on its plain provisions, and technical reservation of a well known right which would enable the State to carry out what policy it pleased.

The Corporation of the City of New York having thus an absolute right to make an unconditional grant of the lands under water, granted to them under the statute of 1807 before mentioned, defeasible only by action of the State; the next question that arises is whether the grant which they made to the heirs of Mrs. Clarke (which is conceded to be conditional), was subject to a precedent or a subsequent condition. It is true, in regard to both subsequent and precedent conditions, that while no formal words are necessary to create them, there are no technical words of such strength in expressing a condition to be either, that will prevent a manifest intention, appearing on the face of the instrument to the contrary, from causing it to be construed as the other. But that is a principle prevailing in regard to every estate, interest or defeasance created by deed; and such must be deemed to be the extent of the language used in such cases as *Nicoll v. N. Y. & Erie R. R. Co.* (12 *N. Y.* [2 *Kern.*], 121). Neither kinds are favorites with the law; but if there be any difference in that respect, precedent ones are least so (*Craig v. Wells*, 11 *N. Y.* [1 *Kern.*], 315), because they prevent anything from passing by a deed. Nothing can dispense with their perform-

ance except what may amount to a new grant (4 *Kent Com.*, 125; 2 *Black. Com.*, 154), while a condition subsequent may be waived or released (1 *Washb. on Real Pr.*, 446).

The usual form of a condition precedent is to convey the land upon condition, either that the grantee do or abstain from doing something, or that something has happened or failed to happen, before the vesting of the estate, without any additional words of forfeiture, right of entry, or declaration that the instrument shall be void on the occurrence of the event which forms the condition, which additional words are not necessary (1 *Shep. Touch.*, 121, *et seq.*) The form of a condition subsequent is that the estate shall be divested, cease, be annulled, or some equivalent expression, and that a right of re-entry shall arise, on the happening of the event constituting such condition. The main question to be determined in regard to the construction of all conditions, is whether the vesting of the estate granted by the instrument containing them is postponed until the happening of the contingent event forming the condition, or is to be divested by it. If anything, therefore, is required by such instrument to be done by the grantee in it, involving the possession of an estate by him, or a right of possession, it would go far to determine the character of the condition. The nature of the event or contingency forming the condition, the time required for the occurrence, as well as its adaptability to either following or preceding the vesting of the estate, may be considered in determining the nature of the condition (*Underhill v. Saratoga R. R. Co.*, 20 *Barb.*, 455; *Armstrong v. Carson*, 2 *Dall.*, 317; *Nicoll v. Erie R. R. Co.*, [*ubi sup.*]; and *Finlay v. King's Lessee*, 3 *Pet. S. Ct.*, 346).

In this case the grant to the heirs of Mrs. Clarke was a bipartite indenture, to which the Corporation of New York was party of the first part, and such heirs by name parties of the second part. The consideration of it, as expressed in it, was the payment and performance, by the grantee, of the rents and covenants therein mentioned. The rent was a certain annual sum of money, without rebate for taxes. For any arrears in the payment of such rent, the City Corporation was to have a right to distrain and re-enter. Besides the covenant to pay rent, one of the other covenants of the grantees, who also executed such grant, was, that they would build bulkheads and fill up roads thirty feet wide over such premises, to become public streets, and keep them in repair; which was followed by a clause of re-

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entry in case of failure to do so within a certain time. It also contained a covenant by the grantors to permit the grantees to collect wharfage from such premises, except from the end of the streets. This was followed by a clause which declared as follows, viz.—that it was expressly understood and agreed, and those presents and the estate thereby granted, were upon the express condition, that if at any time thereafter it should appear either that the grantees were not at the date of those presents, seized of an absolute and indefeasible estate of inheritance in fee simple in the premises on the easterly line of high-water, and adjoining the land conveyed by such grant, or if they should make any default in the performance of any of the covenants, then those presents and everything therein contained should be null and void; the grantors and their successors might forthwith enter upon the premises thereby granted, and should thereafter be seized of the premises, discharged of any claim of the grantees.

It is not possible by any forced construction, however ingenious, to make the two conditions contained in such a clause, so differ in their character, that while the non-performance of the second condition in relation to covenants should be entirely subsequent, the first should be precedent to the vesting of the estate; such a construction would make the word “then” not refer at all to that first condition, while it would render all the subsequent clauses of annulling the deed, right of re-entry, and re-seizing inapplicable and unnecessary to cutting off the grantees from any rights so far as such first conditions was concerned. It is very clear that the second condition was a *subsequent* one, because it consisted of doing something, which might require a period of time in which to be completed, and the payment of a perpetual rent. The clause of re-entry and re-seizin is conclusive upon the question of an intent that an estate should vest, since otherwise they would be wholly unnecessary (*Rogan v. Walker*, 1 *Wisc.*, 133; *Phelps v. Chesson*, 12 *Ired. L.*, 199). As the two conditions, with the clause, which details the consequences of their happening, cannot be separated in character, the first must be a condition subsequent as well as the second.

But the words used expressly make the first condition point not to an existing state of facts alone, but to something future: They are, “*If at any time hereafter, it shall appear that the grantees were not at,*” &c. Such a phrase carries the reader for-

ward to a future occurrence, to wit, the time of such appearance, and considers him as looking back to the date of the deed, by the past tense ("were") instead of the present. I do not well understand by what process of reasoning such words can be disregarded, or their force explained away, unless on the theory presently to be noticed and already alluded to that such grant or conditions subsequent being illegal, it is to be presumed that the condition could not be construed to be anything but precedent, whatever words were employed.

If we are at liberty to look at the whole scope and object of the deed in order to throw light upon the character of the condition, they plainly show an intent, on the part of the grantees, to acquiesce in that intent. The former covenanted to fill the whole premises with earth, so as to rise above the water, and surrender part of that so filled up for public use. Was it intended thereby, that the supposed owners of the upland should lie by and seize on the fruits of their labor and expenditure, without compensation, leaving the grantees liable for the rent, which was part of the consideration for the conveyance. This would have been the extreme of folly on the part of the grantees. As it was the interest and duty of the grantors, under the grant to them of the State, to have such covenants performed, they agreed if they were performed by others to allow them at least to reap the benefit of such performance, until some other person should make his prior right appear.

The argument against holding such condition to be *subsequent*, seems to consist of the following propositions. *First*, That the corporation could not lawfully convey the premises to any one but riparian owners, unless the latter renounced their preemptive rights. *Second*, That not being owners with full powers of alienation to all persons whatsoever, they were not the only persons interested in the condition in question, or designed to be protected by it. *Third*, That the riparian owners are consequently not to be considered as strangers to such grant, but as having a legal right which it protects. And therefore the Clarke grant should be construed in reference to such duty of the corporation to such riparian owners. The whole of this argument evidently turns on the assumption, that the act of the Legislature of 1807, and the grant in pursuance thereof by the Commissioners of the Land Office by forbidding the alienation of the lands thereby granted to any one except the riparian owners without the re-

nunciation by the latter of such right, conferred on such owners vested legal rights, to be protected by, and capable of being enforced against the Corporation, and must stand or fall with it. What I have already said on that point suffices to dispose of that assumption.

But it is said, that as the character of a condition depends, not on any form of words, but the intention of the parties, and as the Corporation under the rules of construction already alluded to must be presumed to have intended to exercise only its legitimate authority and to protect those whom it was its duty to protect, viz.: the riparian owners, the condition in question must, if possible, be interpreted as a condition precedent. It is further contended that the clause immediately preceding such condition by which the meaning and intent of such grant was declared to be, that it should "not be construed to operate further than to pass the title or interest they have or might claim by virtue of their charters and various acts of the Legislature of this State," with the language of the conditions itself, which follows it shows a purpose not to interfere with or prejudice any preemptive rights. If that were so it is singular that no more distinct announcements of such purpose had been adopted. But in fact the purpose of such preceding clause appears to have been merely for abundant caution, to avoid all responsibility for the title, and not to protect the right of a riparian owner who is not mentioned, which if it existed could not be taken away against his consent. That right would prevail, if at all, with much greater force against the grantees than the grantors; and would not rely, for protection, upon a condition which would merely revest the title in the grantors, and leave the riparian owners to enforce their right as they best might. As to any indication of purpose in the language of the condition itself, that is best shown by its legal effect, which could only be, in any case, to divest the grantees of their rights, but not give to the owner of the preemptive right any additional power. In addition to the positive and express language contained in such clause and condition therefore, I cannot perceive a clear purpose to do anything except what they effect, to wit: to protect the grantors against any liability, and reserve a right to re-enter upon the determination of such condition. No court is at liberty to overlook the natural meaning of language used by the parties, in the instrument adopted by them to effectuate their intention, for the pur-

pose of so modifying it as to comport with a supposed matter of policy or even duty.

This leads me to the *third* proposition already referred to as one of the foundations of the plaintiff's right to recover, to wit: that the grant by the Corporation, to the parties through whom the plaintiff claims, enabled him to recover against the defendants without the aid of any proceedings taken by the Corporation itself. In a lease for years, it depends upon the question whether the estate was made absolutely to terminate on the determination of a condition subsequent contained in it, or only a right of re-entry was given, as in the former case it would cease at once (*Parmelee v. Oswego and Syracuse R. R. Co.*, 6 *N. Y.*, [2 *Seld.*], 74; *S. C.*, 7 *Barb.*, 599; *Stuyvesant v. Davis*, 9 *Paige*, 427). In regard to a conveyance in fee, however, the happening of a condition subsequent would not absolutely revest the title in the grantor. Upon its determination, the interest of the grantor and his representatives becomes a mere possibility of reverter, incapable of being assigned (*Nicoll v. N. Y. and Erie R. R. Co.*, [*ubi sup.*]; *Phoenix v. Commrs. of Emigration*, 12 *How. Pr.*, 1). Of course if the condition in question be *subsequent*, the present plaintiff cannot take advantage of it.

The very result last mentioned is sought to be availed of to fortify the argument already alluded to, founded on a supposed duty and intention of the corporation in the reservations in the Clarke grant; as establishing that it could not have been intended to be brought about. But without some grant under which the riparian owners could claim, they were powerless to overthrow the Clarke grant, and they certainly derived no new powers from it or anything contained in it. The fact that they are now in a position to claim some rights if the Clarke grant is held for naught, by virtue of a grant from the grantors of it, gives color to the idea that they must have been the persons intended to have the benefit of the condition in question, but that alone could not, in law, give them a positive right to avail themselves of such a reservation when not mentioned therein.

If any argument is to be drawn in favor of either view of the Statute of 1807, or of the terms of the Clarke grant, on the ground of inconvenience in the former case or great injustice in the latter, it is in favor of the present defendants. If the statute is regarded as a grant of a right to riparian owners, cognizable in a court of law, and no grant could be made by the Cor-

poration until it was ascertained who those owners were, or if every grantee from them took his grant subject to the risk of a mistake by them, it is very evident that the progress of filling up and making streets, which is declared to be the object of such statute would be very slow. The Corporation is not endowed with any means of determining the ownership of the upland, and it is a matter of every day experience that slight matters, not easily noticeable or discoverable, may subvert a title. In the meantime the interests of the city of New York must suffer from the delay, unless the Corporation itself should enter upon the enormous expense of filling up a large space of land on its borders under water. If the Legislature had intended the riparian owners according to their interest to acquire forthwith a right to the land under water they would have granted it to them directly. But their legislation was conducted in such form as to reserve to themselves control over the grant in case it was not made to the right person. It was not to be supposed that after a grantee of the Corporation had expended immense sums of money in filling up land under water, under a pardonable mistake of ownership, they would be so unjust as to wrest the fruits of their labor and expenditure from them for the benefit of any one who might turn out to be technically the true owners, although they never asserted their rights, but lay by and saw the improvement advancing without notice or remonstrance. If the Clarke grant be construed to invest no estate, unless the grantees were at the time, upon a critical examination, owners of the upland, it would be a snare for the grantees to induce them, in the expectation of acquiring title, to incur a great expense and become liable for the payment of rent, when the Corporation of the city could at any time, without notice to them, make a new grant to a newly-discovered owner for a price commensurate with the enhanced value of the lands. It would work injustice to the grantees, therefore, if the condition in it was to be construed as being *precedent* and not *subsequent* to the vesting of the estate, so thereby as to take away all opportunity for at least remonstrance against the injustice of taking away the land.

Unless therefore, the statute of 1807 is to be construed as not merely indicating a policy on the part of the State, but also, as also conferring indefeasible vested rights on the owners of all the upland adjoining the land directed by that statute to be

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conveyed, or it so far carries out such policy as to convert the Corporation of New York into trustees, which would equally make such riparian rights vested, and the grant in question whatever its language may be, is to be construed simply as a means to preserve, or at least as not interfering with such rights, the defendants are entitled to judgment in their favor. For the reasons already assigned, I cannot consider either view sound or supported by anything contained in the statute or the grant.

I do not very clearly see how any question of adverse possession can properly arise in this case. Both parties claim title under grants from the same sources, and that title must be confined to the legal effect of such grants. Possibly a question of the waiver or release of the condition in the grant to the Corporation by the State, or by the Corporation in its grant to Mrs. Clarke's heirs, might arise by their neglect for so long a time to enforce it, while at the same time they allowed parties innocently, and in good faith, to incur expense in making land above water under the mistaken belief that they were owners. It could hardly be the law that long after the riparian owners had lost their right to the upland by adverse possession, grantees of the low land could be dispossessed by proving that they had not been owners of the former at the time of the grant.

I think, therefore, upon the grounds that the Corporation of the City could make the grant it did to the heirs of Mrs. Clarke subject only to be divested by State action, and that such Corporation could not convey any rights of entry for any determination of the condition of such grant, the plaintiff was not entitled to recover, and the defendants are entitled to a new trial on the usual terms.

The judgment should therefore be reversed, with costs to abide the event, and a new trial had.

BOSWORTH, C. J.—The record of the judgment in *Towle v. Farney* was received in evidence against the objection and exception of the defendants. It was not objected to as incompetent, or as not being the best evidence of any fact which it was introduced to prove, but was objected to "as irrelevant."

The jury were instructed that in determining whether *Towle* had title to lots Nos. 117 and 118, they must decide that ques-

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tion "irrespective of any decree or judgment in the case of Towle v. Farney;" that the plaintiff "must prove his title, in *this suit*, to the lots Nos. 117 and 118, precisely as he was required to do in that case;" or, in other words, that the record in Towle v. Farney was not any evidence in this suit, and as against the present defendants of the plaintiff's title to those lots.

That record proves the fact of the recovery of a judgment establishing the plaintiff's right to the possession of lot No. 118, in a suit against a person in actual possession of it. The further evidence that, in execution of that judgment, the plaintiff was put in possession of this lot on the 25th of October, 1856, establishes the further fact that he was in actual possession of this lot, by the judgment of a competent court, over three years before the making of the water grant to him of the date of November 29, 1859.

The record proved the fact of recovery of possession by the plaintiff, in an action commenced in December, 1849, against the persons in actual possession of lot No. 118, and determined his right to it and his pre-emptive right to the water grant as against *them*. And the verdict of the jury in this action determines his right to it and his pre-emptive right to the water grant, as against *these defendants*.

I think it was competent, for any purpose for which it can be seen it was introduced; and if it was competent for any purpose, the exception is clearly untenable.

But if, on any principle, it can be said that it was an irrelevant or immaterial fact that he recovered possession by such a judgment (which we do not concede,) then it is quite clear that the introduction of it could not possibly have prejudiced the present defendants, upon any question submitted to the jury.

The observations respecting this record, are applicable to the introduction of the record in the case of Towle v. Cortlandt Wood, and the exception taken to the admission of the latter.

The exception to the charge, in respect to the question of adverse possession by the defendants, is untenable. The charge was, that if the defendants and those under whom they claim, took possession of the premises in question under the grant made to them in 1837, "by commencing to fill up the land immediately, * * * and have been in that possession

from the 27th of February, 1840," the defendants were entitled to a verdict.

"But if they commenced to fill up in 1837, and *ceased* or *abandoned* the work, then that possession would not be such as the law requires to give them title by reason of holding adverse possession."

The point of this branch of the charge is, that in respect to a possession alleged to consist of occupation, *in filling up the premises*, it ceases when the process of *filling in* ceases and the work of *filling in* is *abandoned*. In this there is no error.

The words "and ceased or abandoned the work," clearly mean a total cessation of the work and an absolute cessation of that kind of occupation of the lot of which the Judge speaks in this part of his charge.

All other of the exceptions to the charge are disposed of by numerous decisions in the Court of last resort, save the exception to so much of the charge as states that the grant of the premises in question, of the date of the 31st of March, 1837, to the heirs of Mary Clarke was void, and vested no estate in them if they were not then the legal owners of the lots Nos. 117 and 118.

The grant itself declares that it is made "upon this express condition, that if at any time hereafter it shall appear that the said parties of the second part (such grantees) were not, at the date of these presents, seized of a good, sure, absolute and indefeasable estate of inheritance in fee simple, of, in and to the lands and premises on the easterly side of the line of high water, and adjoining to the water lot and ground under water hereby conveyed or intended so to be, * * * then * * * these presents, and every article, clause and thing herein contained, shall be absolutely null and void."

They were not then, have not been since then, and are not now, the owners of the lots Nos. 117 and 118, nor had they then any interest or estate therein. But the title to them was then in this plaintiff's grantors.

A grant of the premises in question was made to the plaintiff, as owner (he then being the owner and in actual possession) of lots 117 and 118, on the 29th of November, 1859; and if the grant to the heirs of Mary Clarke shall have no greater effect given to it than the grant itself declares shall be given to

it, then it is no obstacle to a recovery by the plaintiff in this action.

Assuming the verdict in this action to have been rendered upon competent evidence, and that all the exceptions taken by the defendants, saving the one now under consideration, are untenable, it would seem to follow that the plaintiff's right to recover the premises in question is as perfect and absolute (looking only to the substantial rights of the parties) as it would be if the grant to the heirs of Mary Clarke did not embrace the premises subsequently granted to the plaintiff by the grant of November 29, 1859.

The Corporation, in making grant of land under water, covering and contiguous to the premises in question, conveyed by lines running easterly and westerly parallel with 25th and 26th Streets. This is true of all grants given in evidence. The Corporation may properly so grant, and the owners of the upland cannot object thereto (*Nott v. Thayer*, 2 *Bosw.*, 10).

It may be true that the Corporation is the owner of the land between 25th and 26th Streets, on the Hudson River, between high and low water mark, and as such, might have given title thereto to any one purchasing prior to the Act of February 25th, 1826, and perhaps subsequently thereto (*Furman v. The Mayor, &c.*, 5 *Sandf.*, 16; S. C., 6 *Seld.*, 567); and yet it will not follow that the owners of the *upland* are not absolutely entitled to a pre-emptive right to a grant of the land under water to which that Act relates, to the exclusion of the Corporation or of its grantee of the land between high and low water mark, where such a grant had been or is about to be made.

That statute directs the commissioners of the land office to issue letters patent granting to the Mayor, &c., the lands under water, "at and from low water mark, and running four hundred feet into the said river" (the Hudson River) "from a point on the easterly shore of said river, four miles north from Bestaver's Killetje, * * * to Spuyten Duyvel's Creek," (*Davies' Laws of N. Y.*, 675, 676) and impresses upon, and subjects the letters patent and the grant thereby, to the provision, "that the proprietor or proprietors of the lands adjacent, shall have the pre-emptive right, in all grants made by the Corporation of the said city, of any lands *under water*, granted to the said Corporation by this Act."

It is the obvious purpose of this statute, to secure to owners of the upland, to the exclusion of the Corporation as owner of the space between high and low water mark, a pre-emption right to the lands under water to which that act relates, in the event of the Corporation making grants of the same.

The Act of April 3, 1807 (*Davies' Laws of N. Y.*, 434, § 15), impresses the same condition and right upon all the lands under water to which that Act relates, and that covers the space between Bestaver's Killetje and a point four miles north thereof, and between low water mark and a line extending four hundred feet into the Hudson River.

The Act of April 12, 1837 (*Davies' Laws*, 799), vests in the Mayor, &c., of New York, title to the lands in the Hudson River, between Hammond and 135th Streets, extending westerly from the line of the former grants, to the westerly side of 13th Avenue, as regulated by that Act. That Act gives to the proprietors of grants theretofore made by the Corporation, of lands within the four hundred feet, the pre-emptive right in all grants, of any lands under water, granted to the Corporation by the Act of April 12, 1837, "adjacent to and in front of the lands under water so heretofore granted;" and it also secures to "the proprietors of lands having a pre-emptive right to grants of lands under water by virtue of the said Act," (of February 25, 1826), "the same pre-emptive right in all grants made by the said Mayor, Aldermen and Commonalty of the City of New York, of any lands under water granted to them by this Act, (viz., the Act of April 12, 1837).

The obvious meaning of these statutes is, that all the lands under water embraced within the grants authorized by them, shall be granted (if any grants be made thereof) to the proprietor or proprietors of the land adjacent;" that is, to the proprietors of the adjacent uplands, and not be vested indefeasibly in the Corporation as owners of the land between high and low water mark where it had made no conveyance of the same, or in its grantees of such tide way where it had granted the same to persons not proprietors of the adjacent uplands, if any such grants had been made.

It could not have been the intent, nor, is it an equitable or necessary construction of the Act of April, 12, 1837, to require a grant of the land under water conveyed by this Act to any person who might, by misrepresentation in regard to his

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title to adjacent upland, or by reason of the mistake of the Corporation in that behalf, have obtained, prior to April 12, 1837, a grant of land under water to the outer line of the four hundred feet first granted.

The phrase, "the proprietor or proprietors of the adjacent lands," is found in the Act of May 5th, 1786, (1 Vol. *Laws of N. Y.*, Greenleaf's Ed., 284, § 18) and in the Act of April 6, 1813, (1 *R. S.*, 293, § 14). While in 1 *R. S.*, 208, § 77, (Sec. 67) the more brief expression, "the proprietor of the adjacent lands," is employed. In all of these statutes, and in those of April 3, 1807; February 25, 1826, and April 12, 1837, which use the words "the proprietor or proprietors of the land adjacent," the *proprietors* spoken of are the persons owning the upland adjacent.

The Revised Statutes (1 *R. S.*, 208, *supra*), not only prohibit the making of a grant "to any person other than the proprietor of the adjacent lands," but declares that every such grant that shall be made to any other person shall be void. This provision of the Revised Statutes was, perhaps, enacted to save the necessity of bringing a *scire facias*, or proceedings by bill in chancery, or by information, where a second patentee found that by mistake or misrepresentation a prior patent had been issued to one not entitled to it, in order to procure it to be vacated (*Jackson v. Lawton*, 10 *Johns.*, 23; *Jackson v. Hart*, 12 *Johns.*, 77).

The decisions in these two cases proceed on the principle that letters patent are matters of record, and cannot be impeached collaterally. The Courts say that "unless letters patent are absolutely void on the face of them, or the issuing of them was without authority or was prohibited by statute, they can only be avoided in a regular course of pleading, in which the fraud, irregularity or mistake, is directly put in issue" (10 *Johns.*, 26; *The People, &c. v. Mauran*, 5 *Den.*, 389; *Williams v. Sheldon*, 10 *Wend.*, 654, and *Jackson v. Marsh*, 6 *Cow.*, 281, were decided on that principle).

The water grants made by the Corporation of the city of New York, are not "matters of record" in any such sense as letters patent, issued by the State, are. The grant containing the condition in question, is by an ordinary deed of conveyance.

The object of the declaration in the water grant, that "these presents and the estate hereby granted, are upon this express condition," * * * * * that "these presents and every article,

clause, and thing herein contained shall be absolutely null and void," if it shall at any time appear that the grantees were not the proprietors of the adjoining land on the easterly line of high water mark, was probably the same as that of the clause of the Revised Statutes, which declares that a patent issued to a person not entitled to it, shall be void.

The object and design were, that the actual owner of the adjacent land who had obtained a second water grant, might, in the suit in which he established his title to the adjacent upland, and consequently to such a grant, recover from a prior grantee of the land under water, whose grant, by its own terms, was absolutely void, without instituting a suit for the single and sole purpose of avoiding such prior grant.

No cases have been cited which require the Court to give to the water grant made to the heirs of Mary Clarke any force and effect; as the grant itself declares, that on the facts appearing which are established on this trial, it shall be absolutely null and void.

I conclude, therefore, that if there be no obstacle to the plaintiff's recovery except the fact of this prior grant, the judgment should be affirmed.

The fact that the water grant also declares that it shall be null and void, for the further cause that the grantees make default in the performance of any of the covenants on their part therein contained; and the parties of the first part may forthwith enter upon the premises, and shall thereafter be seized of the same, discharged of any claim of the grantees, does not militate against this view.

It would be just, and but a proper precaution, to provide for the right of re-entry in case of a failure by them to perform their covenants.

The Corporation thereby resumed the power, in case the grantees had, by mistake, obtained a grant, when the right to it was in others, to repossess itself of the granted property, and thus be in a condition to perform its duty to the owner of the adjacent upland, and prevent his right being barred by adverse possession, if perchance it could be thus barred.

It is only on the ground that the heirs of Mary Clarke were supposed to be, "seized of a good, sure, absolute and indefeasible estate of inheritance in fee simple of, in, and to the lands and premises on the *easterly* line of *high water* and adjoining

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to the water lot and ground under water," conveyed by the grant of the 31st of March, 1837, that such grant was made. It declares that it was made and granted upon the expressed condition that it should "be absolutely null and void" if it should appear that they were not so seized.

Instead of their being so seized, the plaintiff's grantors had such title. The plaintiff was litigating the question of title to the adjacent uplands from December, 1849, to the 25th of October, 1856, with the tenants of the heirs of Mary Clarke, who were in actual possession; and having established his title, as against them, a water grant of land under water, parallel with 25th Street, and of even width with his adjacent upland, was made to him on the 29th of November, 1859.

He had done nothing to waive or forfeit his pre-emptive right to such grant. At all events, there is no evidence tending to show that such is the fact.

The premises in question are part of the land under water, conveyed by said grant.

His pre-emptive right is absolute. He is the proprietor of the adjacent upland, and as such proprietor has a water grant of the premises in question, and there is no obstacle to his recovery in this suit except the prior grant to the heirs of Mary Clarke, and *that*, by its own terms, is declared to be absolutely null and void on the fact appearing which has been established on this trial.

This pre-emptive right is so definite and absolute, that Courts will protect it (*Armour v. Alexander*, 10 *Paige*, 571; *Furman v. The Mayor, &c.*, 5 *Sandf.*, 16).

The remarks of the Court in *Lytle v. The State of Arkansas*, (9 *How. S. Ct.*, 314,) in relation to the character and quality of the pre-emptive right asserted in that case, are equally pertinent to the pre-emptive right in question. The Court say: "The claim of a pre-emption is not that shadowy right which, by some, it is considered to be. Until sanctioned by law, it has no existence as a substantive right. But when conveyed by the law, it becomes a *legal right*, subject to be defeated only by a failure to perform the conditions annexed to it." The considerations of public policy which led to the creation of the pre-emptive rights there under consideration, are not the same as those which led to securing in the case before us, by positive statute, "the pre-emptive right in all grants made by the Corporation

of the said City, (New York,) of any lands under water, granted to the said Corporation by this Act," (the Act of February 25th, 1826,) to "the proprietor or proprietors of the lands adjacent." But the latter Act is founded in obvious considerations of public justice and the equities of the individuals owning the lands adjacent.

The words of the statute declaring and perfecting these rights, are as clear and peremptory as can well be selected.

It was not intended that the Corporation should have the power and authority, if it made grants of these lands, to make them to any one except the proprietors of the lands adjacent, unless the latter did some act or were guilty of some omission which would defeat the pre-emptive right thus declared.

And every person taking a grant, either as original grantee or assignee, takes it with notice of the right of the true proprietor of the lands adjacent (*Brush v. Ware*, 15 *Pet. S. Ct.*, 93.)

These views will aid in properly determining the question, whether the *condition* in question contained in the grant of the 31st of March, 1837, shall be deemed a condition precedent or subsequent.

There are many cogent considerations why the condition in question should be treated as a condition precedent, and not as a condition subsequent, with all the consequences attaching to the application of the technical rules of that branch of the law, to this case.

First. It is held, and acted on as a basis of judicial decision, that there are no technical words by which a condition precedent can be distinguished from a condition subsequent. That whether it be the one or the other is a matter of construction, and depends upon the *intention of the party creating the estate* (*Nicoll v N. Y. & Erie R. R. Co.*, 12 *N. Y.* [2 *Krn.*], 121). That conditions subsequent are not favored in the law, and can only be reserved for the benefit of the *grantor* and his heirs, and no other can take advantage of a breach of them. (*Id.*, 131.) That where a fee simple, without a reservation of rents, is granted upon a condition subsequent, there is no estate remaining in the grantor; there is simply a possibility of reverter. That this is not an estate, but a bare possibility, which will not in equity even give an assignee of it a right to the interposition of a Court

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of Equity, to divest an estate for the breach of a condition subsequent. (*Id.*, 132.)

Second. The Corporation had not capacity to grant, lawfully, in fee simple, absolute, the premises in question, to any persons except the owners of the adjacent upland, unless they had done some act to waive or dispose of their pre-emptive right to the grant. If about to make a grant to persons not entitled, the Corporation would be restrained by injunction, at the suit of those having the pre-emptive right, provided the latter offered to take a grant on terms as favorable to the Corporation. So, too, if the Corporation should make a grant to persons not entitled, a suit might be brought by those entitled, against the grantees and such Corporation, to avoid the grant, and compel a grant to the plaintiffs. The reasoning of the Court in *Furman v. The Mayor, &c.*, 5 *Sandf.*, 16, and *Armour v. Alexander*, 10 *Paige*, 571, fully supports these views.

The Corporation was not, therefore, the owner of the premises granted, in fee simple, absolute. They held them in trust, in such sense that, if they determined to grant them, the owners of the adjacent uplands would be entitled to the grant if they desired it, and would take it on terms as favorable to the Corporation as others would.

Not being owners in fee simple, absolute, they and their successors are not alone interested in the condition in question, nor are they the only persons, or in fact the persons who should be deemed to have been designed to be protected by it.

Third. Not being a condition which can be deemed to have been inserted as a reservation for the benefit of the "grantor and his heirs," alone or primarily; the plaintiff and his grantors of the adjacent upland, are not to be regarded as strangers, having no interest except that of a possibility of reverter. They had a pre-emptive right to the grant, which was a perfect, legal right, and have done nothing, nor omitted to do anything, to waive or forfeit that right.

Fourth. By 1 *R. S.*, 747, § 23, the assignees of the lessor of any demise, have the same remedy "by entry, action, distress or otherwise, for non-performance of any agreement contained in the lease so assigned, * * * or for the doing of any waste or other cause of forfeiture as their grantor or lessor had or might have had, if such reversion had remained in such lessor or grantor." And by § 25 (*Id.*), the provision of that section ex-

tends "as well to grants or leases *in fee reserving rents*, as to leases for life and for years."

The water grant to the defendant's grantors, of the thirty-first of March, 1837, should be construed in view of the position of the Corporation to the premises in question, of its duty to owners of the adjacent upland, and of the right of the latter.

The grant, before reaching the condition in question, provides that in case of failure to pay the yearly rents reserved, for the space of thirty days after any rent becomes due, the Corporation may re-enter, &c. Next following this provision, are other covenants, occupying some eight folios, and then come these clauses, viz.: "And it is hereby further covenanted and agreed, by and between the parties to these presents, and the true intent and meaning is hereby declared to be, that *this present grant* shall not be deemed, construed or taken * * * to operate further than to pass the estate, right, title or interest *they have or may lawfully claim* by virtue of their *several charters* and the *various Acts of the Legislature of the People of the State of New York*; and it is further expressly understood and agreed, and *these presents* and *estate* hereby granted, are upon *this express condition*, that if at any time hereafter it shall appear that the said parties of the second part, *were not*, at the *date of these presents*, seized of a good, sure, absolute and indefeasable estate of inheritance, in fee simple of, in and to the lands and premises on the *easterly side of the line of high water mark* and adjoining to the water lot and ground under water hereby conveyed, * * then * * these presents, and every article, clause and thing herein contained, *shall be absolutely null and void*."

These provisions indicate a clear intent not to make any grant which could in any way interfere with the pre-emptive right of the true owner of the adjacent upland to a water grant. It is a clear declaration of an intent not to transfer, or to be deemed to have attempted to transfer any *estate* in the premises purporting to be conveyed, unless the grantees were at that time absolute owners, in fee simple, of the adjacent upland.

All the covenants in this grant, on the part of the grantees, were no more or less valuable to the Corporation, whether the *grantees were or were not such owners*. And that condition was manifestly inserted, not for the benefit of the Corporation, the grantor, but for the benefit of the actual owners of the adjacent upland, and that the grant might not be an obstacle to making

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an operative, valid grant to such true owners, whenever it appeared that the grantees were not the true owners.

In any other view it is puerile. The Corporation had no pecuniary or proprietary interest to be protected by it. But it owed a duty to the true owner of the adjacent upland, whoever he might be, and that duty it designed to perform faithfully.

Treated as a condition subsequent, there is no act or duty devolved upon or stipulated for by the grantees; the *non-performance* or *non-observance* of which is to be a *cause* of forfeiture.

There is no event to happen in *futuro*, the happening of which is to be a cause of forfeiture.

The good sense of the condition is, that if the grantees do not then own the adjacent upland, they take no *estate*; and whenever it appears they were not the owners, the Corporation is at liberty to say that the water grant, the instrument itself, and all its provisions, were "absolutely null and void" from its date.

It did appear satisfactorily to the Corporation on the 27th of October, 1859, and such was the actual fact, that the heirs of Mary Clarke were not the owners of the adjacent upland, and that this plaintiff was; and in a water grant of that date, the Corporation granted the premises to the plaintiff, as the person entitled to such grant, and the grant recites these facts.

If the intent of the *grantors*, as clearly manifested by the grant itself, is to determine whether the condition is to be treated as *precedent* or *subsequent*, then it should be held a condition precedent.

It is a condition which they could not lawfully discharge and release.

The conclusion is not weakened by the fact that the grant also declares that if the grantees make default in any of their covenants, the same consequences shall follow, and that the grantors and their successors may re-enter.

That provision is an apt and proper one to meet the case of a default on the part of the grantees to perform their covenants, and has full force in being applied to such a case. It would violate the clear intent, otherwise expressed, to hold that a re-entry or its statutory substitute, was designed to be the only remedy left to the Corporation or the owners of the adjacent upland in case it was ascertained to be true in fact that the grantees did not own the adjacent upland.

Nor does this view interpose any difficulties in the way of the Corporation, in extending the exterior lines of the city, and building new streets, piers, or bulkheads.

It can cut off the pre-emptive right of any adjacent upland owner, by giving notice of an intent to make water grants and inviting bidders. If he declines to take a grant on the condition that no estate passes if he be not the owner of the adjacent upland, and obtains one on such terms, he has no ground of complaint legal or equitable, because he has run the risk of making large outlays on the premises. It is a matter of judicial history that for more than forty years there has been a succession of suits between the devisees of Mary Clarke and purchasers claiming title under acts of the Legislature of this State, and proceedings thereunder, in respect to the title of lots belonging to the estate, which is the upland adjacent to the premises in question (*Sinclair v. Jackson*, 8 *Cow.*, 543; *Cochran v. Van Surlay*, 20 *Wend.*, 365; *Towle v. Forney*, 14 *N. Y.* [4 *Kern.*], 423; *Williamson v. Berry*, 8 *How. S. Ct.*, 495; *Williamson v. Suydam*, 24 *How. S. Ct.*, 427).

So far as the reported cases speak on the subject, the devisees of Mary Clarke and those to whose rights the grantees in the grant of the 31st of March, 1837, have succeeded had been defeated. I do not, on this account, question the good faith of such grantees on applying for and obtaining that grant. Their good faith does not enter into the controversy.

But matters as notorious as it may be presumed the fact and result of these litigations were, from the history of them found in the reports of the different courts, might properly predispose the Corporation, in making the grant in question, to declare in it a clear intent, and insert in it a condition, that no estate should be transferred if the grantees were not at the date of the grant the owners of the upland.

I think the condition in question was inserted to declare and effectuate such an intent, and that this is apparent from the grant itself.

The grantees by virtue of their grant obtained a license to enter and enjoy the premises unmolested by the Corporation, so long as they perform the covenants on their part, and no one appeared claiming to be the true owner of the adjacent upland.

When such a claimant appeared, and was what he claimed

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to be, the Corporation had the right and it was its duty to make a grant to him.

And where, in a suit properly brought by him to recover possession, he establishes his ownership of the adjacent upland, the grant in question should not be held to be an obstacle to a recovery. The defendants are not in a position to claim that the grant to the heirs of Mary Clarke vested any title to the premises in question, in the grantees named in it.

Such a construction is adapted to subserve the ends of justice, and accords with the intent of the grantor in inserting the condition in question, as manifested by the grant itself, and all surrounding facts to which its recitals clearly point.

If the defendants had any equities based on the *good faith* and acts of the grantees in the grant of March 31, 1837, they could have been alleged and protected in this action (*Phillips v. Gorham*, 17 *N. Y.*, 270).

The complaint in this action, in its third acticle, alleges that the defendants pretend to claim some right to the premises in question, that this claim is unlawful, and that defendants' claim to the lot and their possession thereof is fraudulent and void as against the plaintiff.

Without requiring any allegations of the complaint to be made more definite and certain, as provided by § 160 of the Code, the parties have tried the cause upon its whole merits, without any objection thereto that I have discovered, and unless the plaintiff must bring two suits instead of one, and try them separately, it would seem that his right to the premises in question has been fully established, and the judgment rendered should not be disturbed.

I have already considered the exceptions to that part of the charge relating to the question of adverse possession. In doing so, no doubt was suggested whether the case raised any such question for the consideration of the jury.

I think it by no means clear, that any such question can be raised in this case, and if it cannot be, the charge in that behalf is immaterial, as the plaintiff recovered on proof of his title to the upland, and of his pre-emptive right to the water grant which has been executed to him.

By the terms of the grant in question, the grantees agreed that if they were not at its date the owners of the adjacent upland in fee simple absolute, the grant should be absolutely

null and void. They entered under a grant containing such an agreement on their part. Their possession has been qualified by it, and subordinated to it.

It is not adverse to the Corporation in respect to the question of title to the premises granted. Their possession has been under the grant, with no claim of title which is not qualified by these provisions.

The defendants and their grantors have occupied under a grant which declares, and in which they agree that, their occupation shall be deemed to be without title or right to claim any title, if the grantees were not, at the date of the grant, the owners of the adjacent upland. They were not such owners. Their occupation, therefore, has not been hostile or adverse either to the City Corporation or their *quasi cestuius que trust*, the actual owners of the adjacent upland.

Where it appears that the title claimed is subservient to, and admits the existence of a higher title, the possession is not adverse (*Jackson v. Johnson*, 5 *Cow.*, 74). The claim of title on the part of the defendants and their grantors, is under and according to the grant. By the very terms of the grant and the agreement in it qualifying the defendants' possession, the Corporation might re-enter after the lapse of thirty years, as well as at the end of ten years, on its appearing, or proof being made, that the grantees in the grant of March 31, 1837, had no title then to the adjacent upland.

It is impossible that the possession can be deemed to be adverse, in its commencement, to the Corporation, in such sense that twenty years' continuance, of it would defeat this condition of the grant and convert the defendants' title into a fee. A possession, to be adverse, must be accompanied with a claim of *the entire title*, free from all *conditions* and limitations (*Jackson v. Hill*, 5 *Wend.*, 532; *Livingston v. Peru Iron Co.*, 9 *Wend.*, 511; *Thompson v. The Mayor, &c.*, 11 *N. Y.* [1 *Kern.*] 115; *Hoyt v. Dillon*, 19 *Barb.*, 644; *Butler v. Phelps*, 17 *Wend.*, 642; *Burhans v. Van Zandt*, 7 *N. Y.* [3 *Seld.*], 523).

If the condition in question was clearly intended by the grantor as a condition precedent, and if this is manifest from the terms of the grant and notorious surrounding circumstances, then it follows that the defendants took possession, and have at all times occupied under an agreement that they should not be

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deemed to have acquired or have any title, if they did not own the upland. They did not then own, and have not since then owned the adjacent upland. I think, therefore, that their possession cannot be treated as *adverse*, within the rules applicable to that subject.

If these views are correct, the judgment should be affirmed. If they are untenable, it will follow that these pre-emptive rights specially protected as they are by statute, and notwithstanding the apparent effort of the Corporation to do nothing to prejudice or affect them, are destitute of substance, and cannot be enjoyed as a matter of right by those to whom the law declares they belong.

I think the judgment should be affirmed.

Judgment reversed, with costs to abide the event, and a new trial ordered.

BOTSFORD *against* KRAKE.

Surrogate's Court, Otsego County; February, 1866.

WILL.—NUNCUPATIVE WILL.

An officer in the army of the United States in May, 1864, after it had commenced to move on Richmond, wrote and sent a letter to his sister saying if he was killed or did not return, he wanted her to have his property. He was killed in August, 1864;—*Held*, that this portion of the letter was a valid will by a soldier, and should be admitted to probate as such.

Whether a testamentary declaration made by a soldier, in actual military service, is valid as a will, although not made in sickness or peril of immediate death—Query?

Probate of a will.

Barnard Phenix, the deceased, was a lieutenant in the 76th New York Volunteers, in the army of the United States, and had been a soldier from June, 1862, to the time of his death, which took place on or about the 18th day of August, 1864, at or near the Weldon Rail Road in Virginia. He died from a wound

received in battle the day of his death. At the time of his enlistment, and of his death, he was an inhabitant of the town of Cherry Valley in Otsego county. He left him surviving Mrs. Jane Botsford, a sister, Mrs. Mary McKellop, a sister, and Miss Mary Krake, a daughter of a deceased sister, his next of kin. In May, 1864, after our army had moved on Richmond, he wrote a letter to his sister, Mrs. Botsford, in which he informed her that his regiment was going to Richmond, and in case of his death, he wanted her to have his property. On the day of his death, it appears that something was said by deceased, or by his nurses, and attendants, by which it was understood that deceased desired said Jane Botsford to have his property. He was competent, over 30 years of age, and left personal property. Mrs. Botsford propounded this letter, and the declaration, as a will.

N. C. Moak, for respondent.—I. It should be borne in mind that there are three kinds of wills known to the law. 1. A will executed, and attested with all the formalities required by statute. 2. A holograph, or will in the handwriting of the testator, which, although not witnessed or declared to be witnessed to be his will, from its testamentary character, shows on its face it was intended as a will in case of death. (*Worcester's Dict., Tit. Holograph, Burrill's Law Dict., same Tit.*). And it may be a deed, a *letter* or any writing in the testator's own handwriting evincing a desire in case of death, to dispose of his personal property. (*Redfield on Wills*, 168, 169, 176, 542; 1 *Paige*, 369, 370.) 3. The third class are nuncupative, or *unwritten* wills. These are simply verbal declarations of the testator, showing how he desired his property disposed of in case of death. (*Worcester's Dict., Tit. Nuncupative; Burrill's Law Dict., Tit. Nuncupative; 1 Paige*, 369, 370.)

II. In consequence of a frightful case of perjury in England, nuncupative wills proper, or those *unwritten*, made by any person *except he be a soldier or sailor*, were, by statute, surrounded by many safeguards (4 *Kent. Com.*, 517; *marg. p.*). Our statutes (enacted in 1813,) originally read, almost verbatim with the English statute, as follows:

XIV. And be it further enacted: That no nuncupative will shall be good where the estate thereby bequeathed shall exceed the value of seventy-five dollars, unless the same shall be proved by the oaths of three witnesses at the least, who were

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present at the making thereof, nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or words to that effect; *nor unless such nuncupative will be made in the time of the last sickness of the deceased, and in his dwelling house*, or where he had been resident for ten days or more next before the making of such will, except where such person was surprised or taken sick, being from home, and died before his return to the same.

XV. And be it further enacted, That after six months from the speaking of the pretended testamentary words, no testimony shall be received to prove any nuncupative will, except the said testimony, or the substance thereof, was committed to writing within six days after the making of the said will: and further, that no letters testamentary or probate, of any nuncupative will, shall pass the seal of any court, until fourteen days at the least after the decease of the testator shall be fully expired, nor shall any nuncupative will be at any time received to be proved unless process hath first issued to call in the widow, or next of kin of the deceased, to the end that they may contest the same if they please." (1 *Revised Laws*, 367, §§ 14, 15.)

These sections applied to nuncupations made by *civilians* only. The statute contains the same exceptions in favor of *soldiers and sailors*, as its English prototype, as follows.

"XVII. And be it further enacted, That widows may bequeath the crop in the ground of their lands holden in dower, *and that any soldier being in actual military service*, and any mariner being at sea, may dispose of his personal estate *in the same manner as if this act had not been passed.*"

It will be seen that neither the English statute nor our Revised Laws applied to a holograph, or written will, and hence, in this State, any person could make such a will.

In *Watts v. Public Administrator*, the Surrogate of the city of New York admitted a holograph will to probate, regular in form, though unsigned, and with a *testatum* clause without witness, notwithstanding it was claimed, that the fact that it was unsigned, and with a *tes'atum* clause, showed the testator intended something more should be done to complete it. (See the able opinion of CAMPBELL, *Surrogate*, 1 *Paige*, 352—361.) The Chancellor, however, reversed the Surrogate, (1 *Paige*, 348—

383,) conceding the will would have been valid—signed or unsigned—if there had been nothing on its face showing the testator intended to do something further to complete it, but thought the *testatum* clause sufficient evidence that he intended to sign it, and procure witnesses upon it before it should take effect. On appeal to the Court of Errors that Court reversed the Chancellor, and affirmed the Surrogate's decree admitting the will to probate. (4 *Wend.*, 168.)

So MASON, J. says, (8 *N. Y. Rep.*, 201) “a will of personal estate, if written in the testator's own hand, though it has neither his name nor seal to it, *nor witnesses present at its publication*, was held effectual, provided the handwriting could be proved.”

Nor is it necessary that a holograph will should be in any particular form. (*Redfield on Wills*, 168—170; 176; 542, and *cases cited*.) Such was the law of our State in 1830. Has it been changed as regards soldiers and sailors? The Revisers, in their notes, say “sections 25, 26, 27 related to nuncupative wills, and conformed with some new guards and restrictions to the 14th, 15th and 17th sections of the act of 1813, and to 20 *Johns.*, 502; but the legislature substituted in lieu thereof § 22 *R. S.*, abrogating such wills, *except when made by soldiers or mariners*.” The 22nd section referred to, is as follows: “No nuncupation or, unwritten will bequeathing personal estate, shall be valid, unless made by a soldier, while in actual military service, or by a mariner while at sea. (2 *R. S.*, 60, § 22, *marg. p.*)

As regards soldiers and sailors no change was intended. As to them the law was left precisely as it existed at common law. Judge Mason says (8 *N. Y.*, 199.) “As to the wills of soldiers in actual military service, and mariners at sea, *they are left entirely untrammelled by our statutes, and are governed by the principles of the common law*. The exceptions in our statute of wills in favor of soldiers and mariners was taken from the 29 *Car.*, 2, *chap. 3*, and is precisely the same, and the same exception is retained in England by their new statute of wills.” (1 *Vict.*, 26, § 11.) It is true that sec. 40 of our statute of wills declares that “*every last will and testament of real and personal property, or both, shall be executed and attested in the following manner*.”

This section must be read in connection with section 22, *supra*, so as to make the entire statute harmonious, and to give a meaning to both sections. The correct reading of

secs. 22 and 40 will then be as follows: "Every last will of real and personal property, or both, unless made by a soldier, while in actual military service, or by a mariner while at sea, shall be executed and attested in the following manner. * * * The will of a soldier while in actual military service, or of a mariner while at sea, may be made in the same manner as if this act had not been passed," and such our courts have held to be the real meaning of the two sections (8 *N. Y.*, 199; 4 *Bradf.*, 154).

III. In this case the testator, while on an expedition—after our army had commenced its advance on Richmond, 1864—wrote a letter saying if he never returned, he wanted the respondent to have his property. He was clearly "in actual military service," and on an expedition (*Redf. Wills*, 191, 4 *Bradf.*, 158), so that the question whether a soldier while in camp, or on garrison duty, can make a valid will, without observing the formalities required by statute, is not in the case. It is difficult to see why such an one might not, under the broad language of our statute, which *only* requires that he be in actual military service. Nor do I see how it can be claimed that the testator, if a soldier, must be in *extremis*, if by this be meant sick or wounded, and expecting immediate death. It is true the case of *Prince v. Hazelton* (20 *Johns.*, 502,) very properly holds that in case of a *civilian* the testator must be in that condition, for the very statute under which it was decided (1 *Revised Laws*, 367, §§ 14, 15), expressly declared, that to entitle a *civilian* to make a nuncupative will, it must "*be made in the time of the last sickness of the deceased.*" Neither the English statutes, the Revised Laws, nor the Revised Statutes contain any such provision in regard to soldiers or sailors, and what right has the court to require any requisite except what the law-making power have seen fit to declare shall exist? It is possible that in some cases, where the point was not up, the courts in speaking of soldiers and sailors, without having attention called to the difference between them and civilians, may have used the same language; but I have been unable after diligent search to find a case in this country or England denying probate to a soldier's or sailor's will, on the ground that he was not at its making sick or wounded, while several are reported where probate has been granted to those made when the testator was not in that con-

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dition. This being a *written* will like that in *Watts v. Public Administrator* (1 *Paige*, 348, 4 *Wend.*, 168), and the law not having been changed as to soldiers and sailors, the decision in that case should control. The will in that case was made while the testator was in good health, *and many years before he died* (1 *Paige*, 355). So in *Hattat v. Hattat* (4 *Hagg.*, 211, *Redf. on Wills*, 176), the writing was made in the account book *eight months before death*. Redfield says, "It is left *undetermined* in *Hubbard v. Hubbard* (8 *N. Y.*, 203), whether this requirement in regard to nuncupative wills, namely, that they must be made while the testator is conscious of the near approach of death, is applicable to the wills of soldiers and seamen; but it is *claimed* that as this requirement existed long before the statute of frauds, it must be regarded as applicable to such cases, since by the express terms of the statute, those classes of persons are allowed to dispose of their effects 'as before the making of this act.' *But the decided cases do not all seem to conform to this view.*" (*Redf. Wills*, 190—1.) The learned author does not seem to have had his attention called to the distinction between soldiers and civilians, which renders the decisions harmonious.

Again he says: (p. 192,) "By the civil law, the ordinary formalities of executing nuncupative wills were dispensed with in favor of soldiers, and their wills were held valid, *although they should neither call the legal number of witnesses, nor observe any other of the ordinary solemnities in the execution of such instruments, and the same indulgence is held by Swinburne applicable to soldiers in England.*"

Mr. Surrogate BRADFORD, one of the most learned judges upon the subject of wills in America, says in *Ex parte Thompson* (4 *Bradf.*, 160), "As well because the wills of soldiers and mariners were excepted from the operation of the provisions of the statute of frauds, as for the reason and grounds of the exception, and the peculiar character of the military testament, *it was never held requisite that the nuncupations should be made during the last sickness.*"

Judge MASON says, (8 *N. Y.*, 200—201), "The civil law was extremely indulgent in regard to the wills of soldiers. If a soldier wrote anything in bloody letters upon his shield, or in the dust of the field with his sword, it was held a good military testament. The common law however has not extended

this privilege so far as the civil. Blackstone says that soldiers *in actual military service* may make nuncupative wills, and dispose of their goods, wages, and other personal chattels, *without those forms, solemnities and expenses which the law requires in other cases.*"

The English statute, as above shown, is the same as ours.

In *re Parker* (2 *Swaby and Tristram*, 375, *Redf.*, 200, *note*). "Where the master of a vessel, being at an intermediate port, wrote and forwarded by post a letter of which some portion was testamentary, the vessel being *subsequently lost at sea*, it was held that he was a mariner at sea, *and that such letter being in his handwriting, and testamentary, was entitled to probate.*"

So in goods of Milligan (2 *Robertson*, 108), where the testator on the 5th of August, 1848, being perfectly well, wrote and sent a letter, some portion of which was testamentary, and did not die until May 16th, 1849, it was held the testamentary portion should be admitted to probate.

The High Court of Errors of Mississippi, in *Anderson v. Prior* (10 *Smedes and Marshall*, 620), held, "It is competent for a volunteer in the army of the United States, in Mexico, who is a citizen of Mississippi, to make his last will and testament, while abroad in Mexico, disposing of property in that State.

"In such case, a letter written in the handwriting of such volunteer, in which he expresses his desire as to the disposition of his property, in case of his death, was held to have been properly admitted to probate as his will."

The reason why soldiers and sailors are allowed to make informal wills is obvious. They may desire to make them when away from the conveniences for so doing—when no counsel is at hand to advise or conduct the making—when wills, if made, could not be easily or safely kept, to await the death of the testator—and many reasons equally cogent will readily occur.

They are not required to be wounded or sick, when the will is made, by reason (as stated by Mr. Surrogate BRADFORD, *supra*), of the peculiar character of the military testament.

Suppose a soldier should learn while on an expedition that some relative had died, and he had become possessed of a large property. If he could only make a valid will after he was sick

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or wounded, and was in expectation of immediate death, he might now be able to do so. While perfectly well a bullet from the enemy might terminate his life without an opportunity to speak a word. It may be said that this would be an extreme case, but when we consider that for months, and even years, we have had over a million soldiers in the field, it is by no means an improbable one. The true rule is to require nothing more than what the statute says shall entitle the soldier to make a will. If the courts are allowed to engraft, by construction, one requisite, they may a multitude, and the soldier be substantially deprived of the right to make a will. He who lays down his life for his country, has a right to ask that his solemn request as to the disposition of this world's goods shall be respected, and carried out by it.

George Brooks, guardian for Mary J. Krake, cited and commented upon 12 *Barb.*, 148; 8 *N. Y.*, 196; *Dayt. Surr.*, (3rd ed.) 126, and other authorities there cited.

E. M. CAUL, SURROGATE.—The deceased, a volunteer from this State in the actual service of the United States, was wounded in battle, on the Weldon R. R., in Virginia, August 18th, 1864, and died same night. Previous to his death, in a letter written to his sister, Jane Botsford, he expressed a desire and intention in the event of his death that his property, which consisted of personal estate, should go to his sister, said Jane Botsford. On the eve of his death, it appears that the subject that deceased desired to have his sister Jane have his property, was discussed by his attendants, although they do not swear that he said so. I am therefore of the opinion it does affirmatively appear that deceased intended to make a testamentary disposition of his property, and that his sister, Jane Botsford, was to be the sole legatee therein. But it is insisted that our statutes do not allow or tolerate such disposition of property, except in cases of soldiers and seamen, and that they must be in *extremis*. Deceased being a soldier, the only question remaining is, does the statute restrict the making of this class of wills not only to the class of persons mentioned in the statute, but also to the *condition* of the deceased at the time of making the disposition. Judge BRADFORD holds, in *Ex parte Thompson* (4 *Bradf.*, 154), that there is no restriction as to their con

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dition. In *Hubbard v. Hubbard* (12 Barb., 154), the court says the deceased must be in *extremis*. The case went to the Court of Appeals, and in that court was disposed of without any reference to the question, except saying that it was not necessary to decide it. On a careful examination of both the cases above referred to, I find the question was not material to the disposition of either, and neither is therefore binding as an authority. I am inclined to the opinion that this is not a case where it becomes material to pass upon this question for the reason that the facts in this case do not render it absolutely necessary to pass upon it. At the time this letter was written, the deceased was in the army, on an expedition, and in that portion where active operations were constantly going on. It was moving on to Richmond, and from that time to the time of his death was constantly, and almost daily engaged in fighting, so that, in fact there was no period of time during the season of 1864, in that part of our army, but a soldier might be said to be in peril of his life. He was constantly exposed, or liable to be constantly exposed, to death, and this disposition of his property was clearly made in view thereof. He cannot be said to be in *extremis* by sickness, disease, &c. but the peril of death, if required, I think may be from any other cause, and existed in this case by the liability of and the danger from constant engagements in battle. Counsel for the proponent argued that it was only requisite that the soldier should be "in actual military service." This is certainly, at this time, an important question, but I do not deem it necessary to pass upon it. I think this one of the cases intended to be provided for by our statute, and that the disposition made by the deceased is valid. That portion of the letter must be admitted to probate as a will.

Decision accordingly.

GRAHAM *against* CHRYSTAL.

Supreme Court, First District; General Term, May, 1865.

INTEREST.—EXCEPTIONS.—PROOF OF LOSS OF PAPERS.—PRELIMINARY EVIDENCE.

The old common law rule, which requires a demand to be liquidated, or its amount ascertained, before interest can be allowed, has been so far modified, that if the amount is capable of being ascertained, it carries interest. A general exception to the finding of a referee allowing interest is not specific enough; if the error is in allowing interest for too long a period, the exception should state from what period it should be computed.

The proof of the loss of papers, is a preliminary matter addressed to the Court exclusively, and its sufficiency is to be passed on by the Court, in view of the peculiar features of each case.

APPEALS in two cases, from the judgments entered therein, on the reports of a referee.

The action in which the first opinion, below reported, was delivered, was brought by John Graham. The other action was brought by Dewitt C. Graham, and James S. Carpenter, as ex-cutors of the will of David Graham, deceased. Both actions were against the same defendant, Peter Chrystal.

I. The action of *John Graham against Chrystal*, was brought upon a claim by the plaintiff for professional services alleged to have been rendered for the defendant, in defending him in two criminal prosecutions, one against him alone, and the other against him and one Joseph B. Pollard, commenced in the month of October, 1845, and terminated, in the case of the prosecution against the defendant alone, June 14, 1847, and in the case of the prosecution of the defendant and Pollard, in May Term, 1850.

The plaintiff claimed that the defendant promised to pay what the services were reasonably worth, and that the sum of nine hundred dollars, and interest thereon from June 1, 1850, were due.

The defendant denied the retainer, and the promise to pay. Also, that the services were reasonably worth the amount claimed by plaintiff, and pleaded the Statute of Limitations.

affirmed
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The plaintiff replied, putting in issue the allegations under the defence of the Statute of Limitations.

The case was tried before a referee, who reported, among other things, that in 1848, the defendant left the State without apprising the plaintiff of his intention so to do, and plaintiff was ignorant of his residence, from that time till shortly before the commencement of this action; that the work and labor done before June 1st, 1850, after crediting the defendant with a payment of one hundred dollars, was worth nine hundred dollars, and that that sum with interest from June 1st, 1850, amounting together at the date of the report, to \$1,731 95, was due from the defendant to the plaintiff.

Judgment was thereupon entered by the plaintiff for that amount, and costs. The defendant filed the following exception: "Please take notice, that the defendant herein hereby excepts to each and every of the findings of fact and conclusions of law contained in the referee's report in this action, except the 6th and 7th findings of fact,"—and appealed from the judgment.

Harison & Waring, for the appellant (after other points) VI. The referee erred in the second conclusion of law, in allowing interest from June, 1850. No account was ever made out or rendered, and the defendant was not, therefore, chargeable with interest. The plaintiff allows ten years to elapse without asserting any claim in any form. The sum of \$831.95 should be deducted from the recovery, and interest allowed only from commencement of this action—if there be judgment for plaintiff for any amount.

Carpentier & Beach, for the respondent.—I. The exceptions to the report and decision of the referee are insufficient and invalid. (1) They are too general and vague (*Willard v. Warren*, 17 *Wend.*, 257). (2) There is no sufficient exception to the conclusions of law, and this court is not authorized to review the decision (*Brewer v. Isish*, 12 *How. Pr.*, 481; *Magie v. Baker*, 14 *N. Y.* [4 *Kern.*], 435). (3) To enable the appellant to object to the allowance of interest for the whole period, his exception should have been more specific and certain, pointing out the error complained of (*McMahon v. The New York and Erie R. R. Co.*, 20 *N. Y.*, 463).

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II. The allowance, by the referee, of interest upon the amount of the recovery (\$900) from June 1st, 1850, was proper.

The law of *interest* was very fully considered in the case of the Rensselaer Glass Factory v. Reid (5 Cow., 587). It is referred to by Colden, Senator (at p. 596) as being an *equitable* allowance; and the law in this State has settled down into the principle that it is an equitable, and must be a full, indemnity from and with reference to the time of the default of the party upon whom it is inflicted. It was advanced in that case by Spencer, Senator, that interest was allowed by the Court in certain cases *as matter of law*—i. e., in cases of *implied* as well as *express* agreement—and by the jury in other cases, under the direction of the Court, as an addition to the damages (pp. 614, 616).

If interest is to be inflicted upon principles of equity, and as a mulct for the default of a party, the appellant (Chrystal) was in default from the time the respondent's services were rendered to him. No term of credit was given to him. The plaintiff did not agree, but was forced to wait his convenience. If the appellant could run away (as he did), and deprive the respondent of interest upon his claim, during his (the appellant's) absence, *he would be permitted to take advantage of his own wrong*, which neither law nor equity ever allows.

In Lush v. Druse (4 Wend., 313), it was held that a landlord is entitled to interest upon rents, payable in wheat, from the day stipulated for delivery; and this upon the principle that it was the *value* of the wheat that became due, which *value* was payable in a particular way, and that this value could be ascertained by reference to the "market."

This principle was followed up in Van Rensselaer v. Jewett (2 N. Y. [2 Comst.], 135) and broadened into this rule: "Where a debtor is in default for not paying money, delivering property, or rendering services, in pursuance of his contract, he is chargeable with interest from the time of default, on the specified amount of money, or the value of the property or services at the time they should have been paid or rendered." In affirmance of this rule is Livingston v. Miller (11 N. Y. [1 Kern.], 80).

In McMahon v. The New York and Erie R. R. Co., (20 N. Y. 463, 469), it is asserted by Selden, J., that interest is sometimes allowed, although the amount of the demand neither has been nor can readily be ascertained, where the debtor is in default for not having taken the requisite steps to ascertain the amount

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of his debt (*Van Rensselaer v. Jones*, 2 *Barb.*, 643; *Dana v. Fiedler*, 12 *N. Y.* [2 *Kern.*], 40).

BY THE COURT.—CLERKE, J.—We intimated on the argument, that the objections embraced in the first five points of the defendant's counsel were untenable, and we required no notice of them on the part of plaintiff's counsel.

The sixth point of defendant's counsel relates to the finding of the referee, on the subject of interest. He maintains, that as no account was to be made out or rendered, the defendant was not, therefore, chargeable with interest. As the court remarked in *McMahon v. The N. Y. and Erie R. R. Co.*, (20 *N. Y.*, 469), "the old common law rule, which required that a demand should be liquidated, or its amount in some way ascertained, before interest could be allowed, has been modified by general consent, so far as to hold, that if the amount is capable of being ascertained, then it shall carry interest. It was the duty of the defendant in this case, being the debtor of the plaintiff, to ascertain the amount of his debt. This could easily have been done, if he intended to pay for the services rendered to him by the plaintiff, which he was bound to do on their completion. I think, therefore, the exception to this finding of the referee, would be untenable, even if it was properly made. But it is not properly made. The exception is not specific enough. It is a general exception to the finding. If the error was in allowing interest for too long a period, the exception should have stated from what time it should be computed; so as to give the plaintiff an opportunity of remitting the excess, and thus avoid the consequences of the error. (*McMahon v. The N. Y. and Erie R. R. Co.*, 20 *N. Y.*, 470.)

[The Court then disposed of some minor exceptions, which are not important to be noticed here.]

Judgment affirmed.

II. The other action was brought by *Dewitt C. Graham*, and *James S. Carpentier*, as executors of the will of David Graham, and was to recover for professional services rendered by their testator to the defendant, in the same matters as in the above suit of John Graham. Much of the evidence in the two

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cases was identical. Among other things offered by the defendant in both cases was evidence of the contents of letters of David Graham, which was objected to and overruled in both cases.

The following was the introductory examination of the defendant. Q. Have you received any letters or notes from David Graham? A. I have received a letter from Mr. David Graham in reference to this business. Q. How many notes? A. Two or three. Q. Where are those notes? A. I have looked for them among my papers, and cannot find them. Q. What were those letters in reference to? A. Money matters mostly. Q. Can you state the contents of them? A. No; I could not state the precise words, but think I could give the substance perhaps. Q. Will you state the substance of them, sir?

This question was overruled, and the defendant's counsel excepted.

Harison & Waring, for the appellants.

Carpentier & Beach, for the respondent.

BY THE COURT.—CLERKE, J.—We see no better reason for disturbing the findings of fact in this case, than in that in which John Graham is plaintiff. The exceptions in this case, worthy of any consideration, are, except one of them, similar to these in the other, and must receive the same disposition. The exceptions have been treated by the counsel in both cases as similar, except that relative to the ruling, rejecting parol evidence of the contents of David Graham's notes to the defendant. While admissions made by David Graham could not bind John Graham, they would bind himself, and his representatives. The only question, therefore, on this point, is, whether sufficient proof of the loss of the notes was given to allow secondary evidence of their contents. Secondary evidence is not admissible, if by reasonable diligence the original could have been produced. The degree of diligence depends on the nature of the transaction to which the paper relates, and other circumstances. The sufficiency of the proof of the loss is a preliminary point, addressed to and determined by the court exclusively, and upon which it has to pass in view of the peculiar features, which characterize each case as

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it arises. In the case before us the witness testified that he had looked for the notes among his papers and could not find them. He did not say where he had made the search, or that he had made a diligent search; he gave no particulars, and did not state whether he believed they were lost. The referee, who had the witness before him, was, undoubtedly, the best judge of the reliability of this preliminary proof; and he was satisfied that there was not sufficient proof of the loss of the notes to admit secondary evidence of their contents. We cannot say that he erred in excluding it. I think the judgment should be affirmed, with costs.

Judgment affirmed.

CONGER *against* VANDEWATER.

Supreme Court, First District; General Term, May, 1865.

STATUTE OF LIMITATIONS.—JUDGMENTS OF JUSTICES, AND DISTRICT COURTS.

Under the Code, the period limited for the commencement of actions upon a judgment or decree in any court, is twenty years, and this includes judgments in the Marine and Justices' Courts.

Appeal from a judgment recovered at the circuit.

This action was brought by Clinton W. Conger, against Clarke Vandewater and William Valentine. The complaint alleged that the 10th day of April, 1856, William E. Wheaton recovered a judgment in the Marine Court of the city of New York, against Clark Vandewater and William Valentine, for the sum of four hundred and forty-one dollars, and that on the same day a transcript thereof was duly filed and docketed in the office of the clerk of the city and county of New York; that the judgment had been duly assigned to the plaintiff, Clinton W. Conger, and that there remained due to the plaintiff thereon, the sum of two hundred and fifty-six dollars, and

forty-three cents, with interest thereon from October 10, 1856, for which judgment was demanded.

The defendant's answer contained a general denial, and also set up "that the cause of action set forth in the complaint, did not accrue within six years next before the commencement of this action, and that the same was barred by the Statute of Limitations."

The cause was tried before the Hon. William H. Leonard, Justice, without a jury, at a Circuit Court, held at the City Hall, in the city of New York, on the 2d day of July, 1863.

The Court found and decided as matters of fact:

First.—That the judgment was recovered in the Marine Court, and a transcript duly filed, and the judgment duly docketed, in the office of the clerk of the city and county of New York, as alleged in the complaint.

Second.—That the action was not brought within six years after the cause of action accrued.

The Court found and decided as matters of law—

That the action was barred by the Statute of Limitations, in that the cause of action was not commenced within six years after the cause of action accrued, and therefore, that the complaint be dismissed with costs; to which finding of law and decision the plaintiff's counsel duly excepted.

It was proved that William E. Wheaton assigned said judgment to the plaintiff, and that the action was commenced on the 22d day of April, 1863.

E. N. Taft, for plaintiff appellant.—I. The judgment upon which this suit is brought is to be regarded and treated as a judgment of the Court of Common Pleas for the city and county of New York, upon whose judgments an action is unquestionably not barred in less than twenty years (Code, §§ 68, 93, 90; *Lyon v. Manly*, 18 *How. Pr.*, 267; *Waltermire v. Westover*, 14 *N. Y.* [4 *Kern.*], 16).

II. But if this judgment were to be regarded as a judgment of the Marine Court, still the law is plain, that an action upon it could be brought at any time within twenty years after the cause of action accrued (Code, §§ 73, 90 & 9).

By § 73 the statutes existing at the time of enacting the Code, applicable to cases like the present, are expressly repealed, and the provisions of the Code substituted in their

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stead (See *Nicholls v. Atwood*, 16 *How. Pr.*, 475; *Delavan v. Florence*, 9 *Abb. Pr.*, 277; *Mills v. Winslow*, 2 *E. D. Smith*, 18).

Abrm. R. Lawrence, for the respondent, argued, with other matters, that "the action on the judgment in question was barred by the Statute of Limitations (2 *R. S.*, 295, § 18, 2d ed.; *Lester v. Redmond*, 6 *Hill*, 590).

BY THE COURT.—CLERKE, J.—(After disposing of two points of minor interest.) III. The only question worthy of any consideration in this case, is, whether the action on the judgment in question is barred by the Statute of Limitations.

Regarding this as a judgment of the Marine Court, and in conformity with the decision in *Lester v. Redmond* (6 *Hill*, 590), admitting that, in reference to the provisions of the Revised Statutes, relative to the limitations of actions, the Marine Court is not to be deemed a court of record, it appears to me, that, by the provisions of the Code, the period prescribed for the commencement of actions is twenty years upon a judgment, or decree in *any* court. The provisions of title II., chap. 4, part III., of the Revised Statutes, relate to actions in all courts,—courts of record and courts not of record,—and, by the 18th section of that title, the time limited for the commencement of actions upon judgments of any court, not being a court of record, is six years. New legislation, however, is entirely substituted by the Code of Procedure for the provisions of the Revised Statutes. This legislation is contained in title II. of the Code, consisting of four chapters, and thirty-eight sections. The very first section of this title (§ 73) repeals all the provisions of the Revised Statutes, and substitutes the provisions of the title in their stead. In the class of actions, the commencement of which is limited to six years, those upon judgments rendered in any court, are omitted (§ 91), while in the class of actions, the commencement of which is limited to twenty years, judgments of *any* court of the United States or of any State or Territory are included (§ 90). In the Revised Statutes the distinction between courts of record, and courts not of record is carefully observed; as in the 1st and 2nd subdivisions of section 18 of title II., relating to the limitation of six years, and in section 46 relating to the limitation of twenty

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years; while the Code of Procedure makes no such distinction, and, with an evident intent, entirely ignores it.

This action is, therefore, not barred, and the judgment should be reversed, and a new trial ordered, costs to abide event.

*Criticized
9 Barb. 418*

POWERS *against* SHEPARD.

Supreme Court, First District; Special Term, October, 1865.

POWERS OF LEGISLATURE.—INTERPRETATION OF STATUTES.

The provisions of sections 3 and 4 of chapter 29 of the laws of 1865, prescribing a maximum payment for enlisting soldiers is void.

As the statute interferes with individual freedom of action, it must be construed like a penal statute, strictly; and it does not therefore forbid a contract for the procurement of volunteers at a higher price than six hundred dollars.

Under our system of government, the moral, religious, and economic interests of society are beyond the sphere of legislative action. The exercise by the legislature of a control over the terms of contracts was never contemplated by the framers of the political constitution, and is nugatory.

Demurrer to complaint.

This action was brought by Edward J. Powers against John Shepard, to recover the sum of eight hundred and fifty dollars, and interest, alleged to be due upon a written contract made by defendant with plaintiff to fill the quota of seventeen men, called for the United States, from the town of Shasta, Livingston County, New York, under call of December 19th, 1864, by the President. The contract was made the 9th day of March, 1865, and modified on the 21st day of March, 1865. It appeared by the complaint that the terms of the contract were that the plaintiff was to enlist seventeen recruits to the credit of said town, at an agreed price of eight hundred and fifty dollars each, in full of bounties, premiums, &c., that said men

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were furnished, and defendant paid thereon the sum of \$12,600, and plaintiff brought this action for the balance.

The defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action.

S. I. Freeman, in support of the demurrer.—I. The contract which is declared upon, is in direct conflict with an act of the legislature passed Oct. 10, 1865, prescribing the amount to be paid for substitutes. The contract is absolutely void, and plaintiff cannot recover upon it (*Laws of 1865*, chap. 29, §§ 3 and 4).

II. It appears by the allegations of the complaint that defendant has already paid for each of said recruits the sum of eight hundred dollars, being an excess of one hundred dollars over the amount allowed by the statute cited, to cover bounty, and incidental expenses of each recruit; therefore he cannot recover further.

III. A pleading cannot be adjudged frivolous unless the grounds are clearly untenable or manifestly put in for purposes of delay and vexation (6 *How. Pr.*, 331).

This has manifestly not been put in in bad faith, but as the only mode, in the judgment of counsel, to raise the question of the effect of the statute cited, upon contracts of this nature; therefore if in the judgment of the court the pleading is insufficient for that purpose, leave should be granted to plead over again.

IV. This contract is against public policy, in drawing men from one county to, or to be credited to another, and also in treating men as articles of merchandise, to be bought or sold.

Ira D. Warren, for the plaintiff.—I. Section 3 of the act of February 24, 1865, to provide for filling the quota of men required from the State provides "that no greater sum than one hundred dollars shall be paid for three years," &c. Section 4 then provides, "that no city, county, or town, shall borrow, &c., except as provided in section 7." Section 7 provides for cities, counties and towns borrowing money in certain ways, by a vote of the town, &c., making it a town tax. Section 4 further provides, "Nor shall any city, county, or town, or individual, or any individuals, pay any money for such purpose or pur-

poses otherwise than as herein provided (except that any individual may in any way hire a substitute to exempt himself from draft)."

If the court thinks that the language "*otherwise than as herein provided*" refers to the *amount* to be paid rather than to the manner of paying it, then we say:—

1st. There are no negative words—nothing showing what the consequences of a violation of the act by an *individual* will be. There are no penalties, no mode of punishment; the act is not declared void if he does it—and as it is a perfectly legal one at common law, there is nothing in this act making it illegal to hire a man to serve one's country, or a dozen men, if one pleases, any more than there will be to hire them to serve himself (*Fairchild v. Gwynn*, 14 *Abb. Pr.*, 126, and cases there cited). If this statute means that no individual has the right to more than one substitute, when he paid for it from his own means, then it is one directly discouraging enlistment, and against public policy.

The allegation in the complaint is that these seventeen men were furnished for *the defendant*. The presumption of law is that they were furnished legally, as they were furnished, and accepted by the defendant.

It does not appear that more than six hundred dollars was paid to any recruit.

II. We say that the legislature had no power to fix the price of substitutes, any further than the amount the State would pay. If some patriotic man chooses to fill the entire quota of his town, and pay it out of his own pocket, has he not a right to pay one thousand dollars each for them?—can the legislature say you shall not pay more than ten dollars? The language in § 4, "*otherwise than as herein provided*," refers to the manner of payment provided for in § 7, rather than to the amount. The language of the exception is "*may in any way hire*," not for any amount. Statutes in derogation of the common law admitting of two interpretations, that which most nearly conforms to the common law is in all cases to be adopted, or if there is any ambiguity or doubt about it the common law controls (*McClush v. Cromwell*, 11 *N. Y.*, 593; and see 22 *Wend.*, 395; 2 *Conn.*, 419; 22 *Barb.*, 662).

III. But we think § 11 of this act settles this question. It first provides that it shall become a law from the day of its

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passage, *but shall not take effect* until after the canvass of the vote at the next general election, which is in November next. In the concluding lines of § 11 the legislature declare that the law shall not take effect "*until after the adjournment of the next legislature*" (*Laws of 1865*, p. 65, § 11). Had it taken effect within twenty days of its passage, as provided for in the Revised Statutes, it could not apply to us, as it was passed February 24, 1865, and our contract was made March 8th, 1865, seven days before it could have taken effect had nothing been said about it.

CLERKE, J.—I. If the legislature of this State has the power to prescribe to any citizen what amount of money he shall pay for a substitute to represent him in the national army, it has the power to prescribe what he shall pay for any article of commerce, for any pleasure, or any social or domestic enjoyment. I admit that the legislature is vested with all the powers of government, not delegated to the United States, and which have not been expressly or impliedly delegated to other departments of the government of the State, and that there are no restraints upon its political power, except those which are declared by the constitution of the State. But, I, nevertheless, think that it is not absolute and omnipotent, and that its power is limited to the legitimate sphere of political society. Constitutional government, under whatever form it may exist, is not based on the idea that all the conduct, and acts, and interests of a citizen, are the proper subjects of legislation. On the contrary, the tendency of such a system is to confine the action of government within as limited a sphere as is consistent with the maintenance of the peace, good order, and progress of society. It recognizes the great truth, that the most important and sacred purposes and interests of society are not within the domain of civil law, but are regulated and allowed by the power of self-adjustment, which God has implanted through the balancing and antagonism in it, of the various needs and aspirations of the individuals of whom it is composed. The moral and religious interests of society, for instance, are out of the sphere of law,—out of the sphere of political government; they are merely left to individual and social efforts, prompted by benevolence and conscience. Not only are such efforts infinitely more benignant, but they are much more

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effectual than they possibly could be made through the cumbersome machinery of State or any other political government. The rights of imperfect obligation, to employ a legal phrase, are much more numerous than those of perfect obligation. So it is with the economic interests of the individuals who compose society. Every individual, or rather the great majority of individuals, know much better than any public authority can know, what price he should give for the various commodities of necessity or luxury, which he needs. The interests of the buyer on the one hand, and of the seller on the other, will be much more likely to adjust the proper price, than any intervening authority can possibly do: on the contrary, the latter would, inevitably, produce disturbance and confusion, if not distress, as similar interference did in the markets of Paris, during the first French revolution. I hold, therefore, that the exercise of such power by the government was never contemplated by the framers of our political constitutions, or by the people who ratified them; and that the powers of the legislature cannot be extended so far as to dictate to individuals what price they shall give, or what price they shall receive, for any thing which they may want to buy or to sell. If it possessed this power, for instance, of dictating what price citizens should give for any article of dress, it could prescribe what kind of dress they should wear; and thus we may, during any legislative session, hear that we had returned to the days of sumptuary laws. Formerly, in England, penal laws were enacted by its omnipotent Parliament, to restrain excess in apparel,—chiefly in the reigns of Edward III., Edward IV., and Henry VIII., against piked shoes, short doublets, and long coats; all of which, Blackstone tells us, were repealed by statute (1, *Jac. I.*, c. 25). But, he remarks, as to excess in diet, there still remains one ancient statute unrepealed (10 *Edw.* 3, c. 3), which ordains that no man shall be served at dinner or supper, with more than two courses, except upon some great holidays, there specified, in which he may be served with three.

Can we believe that such things, in any age of the commonwealths of America are cognizable by laws, or that the people of any of them delegated such power to their legislature. No; the legislative power of America is not omnipotent in this sense; all regulations relative to private manners and habits,

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and to prices and expenses, are not within the domain of civil law. The possession of such power belongs alone to absolute governments, or to Parliaments, which claim omnipotence. A power so infinite is inconsistent with the character and design of constitutional republican government. All the political power which the people, in their sovereign capacity, can, consistently with this character and design, exercise, has been delegated to the legislature; but nothing more. It can no more prescribe to us what price we shall pay for a coat, or for a substitute in the army, than it can prescribe what kind of shoes we shall wear, or how many courses we shall have for dinner. No government possessing such power could be called free; and yet in framing the present constitution, the people declare that they establish it in gratitude "to Almighty God for their freedom."

II. Again, even if the legislature possessed this power, I think an act of this kind, so far as it interferes with individual freedom of action, should be strictly construed. Like penal acts, and acts in favor of corporations or particular persons, acts in derogation of common right should not be extended beyond their express words or clear import. This act prohibits the payment of a greater amount than three hundred dollars for a one year volunteer or substitute, four hundred dollars for a two years' volunteer or substitute, and six hundred dollars for a three years' volunteer or substitute; that is, no volunteer or substitute shall receive a larger amount for these different terms of service, than the respective sums mentioned.

This action, however, is not to recover money paid to volunteers or substitutes, but money which the defendant promised to pay the plaintiff for furnishing volunteers or substitutes. This money, it is to be fairly presumed, not only included the sums paid to the volunteers or substitutes, but, also, such sum as would be a compensation to the plaintiff for procuring the volunteers or substitutes. It, certainly, would not be just to expect that this plaintiff should perform services without some compensation. Like any other agent or servant he is entitled to compensation; his services were exceedingly useful to the plaintiff, and could not be rendered by him without considerable labor and trouble; and the difference between the amount of the bounty allowed by the act and that promised to be paid by the defendant, may be deemed the measure of the plaintiff's compensation. It does

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not appear in the complaint, that the volunteers or substitutes received more than the act allows.

The demurrer must be overruled with costs, with liberty to defendant to answer within twenty days on payment of costs of demurrer.

LEWIS *against* RANDALL.

Chenango County Court; March, 1866.

STAMPS UPON PROCESS.—AMENDMENT OF APPEAL.—CONSTITUTIONAL LAW.

The court to which an appeal is taken from a justice's court should not dismiss the appeal upon the objection that the notice was not stamped, as required by the United States Internal Revenue Law.

The provision of the Code of Procedure of this State, allowing amendments to be made to cure the omission of a party to do any act necessary to perfect an appeal or to stay proceedings (*Code*, § 327), does not authorize affixing a United States Revenue stamp upon the notice of appeal, after motion to dismiss the appeal for want of such a stamp.

Process on appeals from justice's courts, or other courts of inferior jurisdiction, to a court of record, which, by the Internal Revenue Law, are required to be stamped, are not *void* if not stamped. Congress have not constitutional power to take away the jurisdiction of a State court.

Motion to dismiss an appeal.

C. L. Tefft, for the respondent.

S. Bundy, for the appellant.

H. G. PRINDLE, COUNTY JUDGE.—This action by George J. R. Lewis against Hezekiah A. Randall, was commenced in a justice's court, and brought by appeal to the Chenango County court. The respondent now moves to dismiss the appeal on the ground that the notice of appeal was not stamped, pursuant to the Act of Congress.

The portion of the Act of Congress relating to this question is

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as follows: "Writs or other process on appeals from justice's courts, or other courts of inferior jurisdiction, to a court of record, fifty cents."

It is quite clear to my mind that it was the intention of Congress to require a stamp to be affixed to the process by which a suit is removed from a justice's court to a court of record. Unless such stamp is affixed, the process is made void by the act of Congress; and if void, the county court has no jurisdiction of the case.

In the case of *Whiteley v. Leeds*, in the Common Pleas of the city of New York, the court held that it was necessary that the notice of appeal should be stamped; and allowed the appellant to affix the stamp in open court, under section 327 of the Code of Procedure, which provides as follows: "Where a party shall give in good faith notice of an appeal from a judgment or order, and shall omit, through mistake, to do any other act necessary to perfect the appeal or to stay proceedings, the court may permit an amendment on such terms as may be just."

I think the court, in this case, did not take a correct view of the law. The above section of the Code was never intended to reach a case of this kind. The Code provides certain steps to be taken, in order to perfect an appeal, and if the appellant should bring the appeal in good faith, and by mistake should neglect to do some act necessary to perfect the appeal, the court, on being satisfied of the fact, could, under the above section of the Code, allow time to supply the defect. The rule was adopted with special reference to the rule then in existence in regard to appeals, and the steps necessary to be taken by the appellant in order to perfect his appeal. It had no reference to the Stamp Act passed by Congress. The Code was adopted years before the Stamp Act was even contemplated, and even if the Code had been passed subsequent to the Act of Congress, the notice of appeal being void, could not be made effective by being stamped in open court, unless authorized by the Act of Congress. The Act of Congress provides that such process, unless duly stamped, is void and of no effect. It is not merely voidable, but absolutely void, and if void, no act of a State court could make it valid. If Congress had the power to declare the process of a State court void for want of a proper stamp, I can see no escape from the conclusion that the appeal must be dismissed; and the only remaining question to be considered is, whether Congress

has authority to declare the process of a State court void for the want of a proper stamp.

In determining this question, the first inquiry arises in regard to our State courts, whether they exist and are entirely independent of Congress as regards the question of process and jurisdiction. If they are entirely State organizations, and can in no way be legitimately interfered with by Congress, then Congress can no more interfere with their jurisdiction by declaring a process void for want of a stamp, than by attempting to determine the form or nature of a process to be issued in order to acquire jurisdiction in a particular case. Congress has no power to legislate on the question unless the same is authorized by the Constitution. The powers of Congress are delegated by the Constitution, and article 10 provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The government of the United States is a derivative one, and can claim no powers which are not granted by the Constitution, either in express terms, or by necessary implication. All powers not delegated to it, or not inhibited to the States, are reserved to them, or the people. The powers bestowed by the Constitution upon the government of the United States are limited in their extent. As the State governments retained the right to make all such laws as they might think proper within the ordinary powers of the legislatures, if not inconsistent with the powers vested exclusively in the Federal government, they only look to that instrument for *restrictions upon*, and not for *grants* of legislative authority, whilst the national legislature is dependent entirely upon the provisions of the Federal Constitution for all the powers which it possesses, and, like the government under which it exists, it can exercise no powers except those expressly granted, or arising by necessary implication.

Among the powers expressly delegated to Congress is the right to lay and collect duties, taxes, imports and excises. I think, however, that there are certain limitations and restrictions to the exercise of this right: there is, perhaps, no limitation to the extent of the right so far as the individual members of the government are concerned, but where Congress attempts to carry the doctrine to the extent of depriving a State court of jurisdiction, it is quite a different question, and one of much

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greater magnitude. There is a palpable distinction between the powers of Congress and those possessed by the legislatures of the respective States. The legislatures of the respective States, independent of any constitutional restriction, are undoubtedly vested with unlimited powers of legislation.* The decisions of English courts, of questions arising under their Stamp Act have little weight as precedents in determining the question in this case, as the legislative powers of that government are not restricted by the Constitution in this respect. Judge STORY, in his Commentaries on the Constitution, in speaking of the rules by which that instrument should be interpreted, among other things, says: "One important rule in the interpretation of the Constitution is, not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, or even mischievous. It should never be lost sight of, that the government of the United States is one of limited and enumerated powers; and that a departure from the true import and sense of its powers is *pro tanto* the establishment of a new Constitution. To the general government are assigned all those powers which relate to the common interests of all the States, as comprising one confederated nation, while to each State is reserved all those powers which may affect or promote its own domestic interests, its prosperity, its policy, and its local institutions," within the above rule.

Let us again advert to some of the provisions contained in the Constitution. The first subdivision of section eight, article first, of the Constitution, before alluded to, provides that Congress shall have power "to lay and collect taxes, duties, imports and excises." Subdivision nineteen of the same section provides that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the government of the United States, or in any department or office thereof." It is quite clear that the first subdivision quoted, confers no authority to make the process of a State court void. Laying and collecting taxes is one thing, and declaring process void another. If Congress possessed the power to pass the statute in question, that power was derived from the latter subdivision quoted. But can it be said to be necessary and proper that Congress should inter-

* Compare Powers v. Shepard, *Ante*, 129.

fere with the jurisdiction of a State court in order to "lay and collect taxes, duties, imports and excises?" I think not. Congress has abundant power to lay taxes, and collect taxes, and raise sufficient money for all government purposes, without laying its hands upon the machinery of State government. It has the power to tax the people in their capacity of citizens of the United States, all that they are able to bear, and all that the necessities of the government demand. Indeed, the whole property of the people can be taken away by the levy of direct taxes, and by taxing their products, and their transactions with one and another as citizens. Wherefore then the necessity for Congress to invade the department of State authority in the levy and collection of taxes! It could not have been contemplated by the framers of the Constitution that the general government should possess this authority. That instrument was framed clearly and unmistakably upon the theory that State government should co-exist with the general government, each sovereign and independent in their legitimate sphere of governmental action: that States should not interfere with the functions of the general government, and that the general government should not interfere with the functions of the respective States. If a statute of the United States is allowed to block the wheels of State government, the harmony and beauty of our system is destroyed, and the departments of State and national authority are so intermingled as to result in interminable confusion and uncertainty. If Congress can declare void the notice of appeal by which a cause is removed from one State court to another, unless a certain stamp is affixed thereto, it can upon the same principle, and to the same extent, interfere with every process and proceeding from the commencement of an action, to the satisfaction of the judgment, in every State court, from the highest to the lowest. It can lay hold of the executive and legislative departments of State machinery, and compel from them obedience to its power. It can make State laws and constitutions void unless duly stamped, and can compel governors, legislators and all State officers to place a badge of inferiority, in the shape of a United States Revenue stamp, upon every official document which they are called upon to issue. If it can make process void unless a fifty cent United States revenue stamp is affixed to it, it can make it void unless a two hundred dollar stamp is affixed, and

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thus practically wipe out the entire jurisdiction of our inferior courts. Is the possession of such authority on the part of Congress consistent with the independent existence of State governments, or the spirit of the Constitution, which clearly recognizes such independent existence? If a proposition had been made in the convention by which the Constitution was framed, to clothe the United States government with such authority over the institutions of the States, who believes that it would have been adopted? Would the States have ratified such a proposition? If not, the Constitution should not now be extended by construction to embrace it. It would be unwarrantably adding to the Constitution, rather than construing it. It is equally for the interest of all that the division line of State and National power should remain as defined by the makers of the Constitution. The people are interested in the preservation of both State and National government; and it is the duty of those who are called upon to pass upon the validity of statutes to see to it that the one does not invade the domain of the other.

It would hardly be contended that a State could pass a law interfering in such a manner with the jurisdiction or proceedings of a United States court; but I cannot see why such a law would not be as valid as the one in question.

It has been with considerable hesitation that I have attempted to discuss the constitutional question involved in this case. I have held the question open for some time in the expectation that some one of the higher tribunals of our State would decide it. The question having been raised in this case, it is as much my duty to determine it, so far as this tribunal is concerned, as to determine any question that might be raised in regard to the construction of a law of the State. Judge KENT lays down the rule that "the interpretation or construction of the Constitution is as much a judicial act, and requires the exercise of the same legal discretion, as the interpretation or construction of a law. To contend that the courts of justice must obey the requisitions of an act of the legislature when it appears to them to have been passed in violation of the Constitution, would be to contend that the law was superior to the Constitution, and that the judges had no right to look into it, the Constitution, and regard that as the paramount law."

The construction I have given to the act of Congress is not entirely without precedent. The Supreme Court of Indiana, in

the case of *Warner v. Paul* (reported 4 *American Law Register*, 157), in a well-considered opinion, held substantially the same doctrine, and in *Watson v. Bryenth* (29 *How. Pr.*, 357), Justice BARNARD held the same, although he did not discuss the question.

The appellant having complied with all the requirements of the Code in bringing his appeal, and as I am of the opinion that Congress had no authority to deprive the court of jurisdiction by declaring the notice of appeal void for the want of a stamp, the motion is therefore denied; but the question is of such a nature that I think it should be denied without costs.

Order accordingly.

BEECHER *against* ACKERMAN.

New York Superior Court; General Term, May, 1863.

RELIEF AGAINST USURY.—DISMISSAL OF COMPLAINT.—PLEADING.

Where an usurious loan is secured by a pledge, one who purchases the thing pledged from the borrower, and agrees to pay the debt, is not a borrower within the meaning of the statute of 1837, which allows borrowers on usury to maintain actions for relief against their contracts, without paying, or offering to pay, the principal or interest.

But in an action by such a purchaser for relief from the usurious contract, the complaint should not be dismissed at the trial merely because it does not contain an offer to pay what is equitably due; but he may have judgment for such relief, conditioned upon his making such payment, with costs.

Where, after such a transaction, the purchaser of the securities obtains a further usurious loan from the same lender, giving one note for the total amount, and pledges other property to secure the whole, the property last pledged cannot be retained by the lender as security for the original loan.

Where securities are delivered and accepted in payment of a usurious loan, with a guaranty, by the debtor, of the payment of such securities, the debtor cannot recover back the securities; but the guaranty is void, and he may compel the surrender of that.

Beecher v. Ackerman.

Appeal by the plaintiff from a judgment for the defendant, entered on the decision of Mr. Justice BARBOUR, after a trial before him without a jury, in March, 1862.

The action was brought by Luther Beecher against George Ackerman. On the 8th of March, 1856, Alvin Wilkins applied to the defendant, in the city of New York, for a loan of eleven thousand dollars, upon the representation that he had entered into a contract with The Mineral Point Railroad Company to construct its road, and it was thereupon agreed between them that the money should be loaned to Wilkins by the defendant, at the rate of seven per cent. per annum, and one and a half per cent. per month, in addition, under the name of a commission, amounting in all to over nine hundred dollars, to be deducted from the eleven thousand dollars at the time of the making of the loan, and retained by the defendant; that Wilkins should give his note to the defendant for the eleven thousand dollars, payable with interest, four months from date, and should collaterally secure the same by an assignment and transfer to the defendant of certain bonds issued by the County of Iowa, in the State of Wisconsin, to the amount of twenty-two thousand dollars, then held by Wilkins; all of which was then done.

In June, of the same year, the plaintiff and Wilkins, together, called upon the defendant, and stated to him that the plaintiff had purchased the interest of Wilkins in the railroad contract, and in all his property connected with it, including the pledged bonds, and had assumed the payment of his debt to the defendant for his loan; and, at the same time, an application was made by the plaintiff to the defendant for loans to be made by the latter to him. An agreement was thereupon made between the plaintiff and the defendant, to the effect that the latter should lend to the former sums of money, from time to time, as they might be wanted, upon the plaintiff's promissory or stock notes, secured by the pledge of Iowa County bonds, or drafts of the Mineral Point Railroad Company, and that the plaintiff should allow and pay to the defendant two per cent. per month for the use of the money so loaned, either in money or by giving other notes for such percentage. It was also further understood between them, that the plaintiff should assume the payment of Wilkins' note for eleven thousand dollars; and that

the twenty-two thousand dollars of Iowa county bonds in the hands of the defendant, and subject to his lien, had been purchased from Wilkins by the plaintiff.

Under and in pursuance of this agreement, the defendant, prior to November, 1857, loaned to the plaintiff, at sundry times, various sums of money to a large amount, receiving from him, upon the making of such loans, for the use thereof, the percentage so agreed upon, either in money or notes, and taking therefor the plaintiff's notes, collaterally secured as agreed upon. When Wilkins' note for eleven thousand dollars became due, that note was extended for thirty days, and again for sixty days; the plaintiff, upon each occasion, paying or accounting to the defendant for the extension, at the rate of two per cent. per month; and upon maturity of the sixty days' notes, a note of the plaintiff for twelve thousand dollars, payable to the defendant four months from date, was substituted in place of the Wilkins notes;—upwards of nine hundred dollars of which being for the interest upon that twelve thousand dollar note, and the difference being paid or accounted for by the defendant to the plaintiff.

In April, 1857, the twelve thousand dollar note, which had been renewed upon the same terms, for sixty days, together with another note, which had been given to the defendant, by the plaintiff, for loans made to himself under the agreement, were consolidated in one note, then given by the latter to the former at sixty days, including interest to maturity, at the rate of two per cent. per month; and in July following, a new note at sixty days, for thirty thousand dollars, was given to the defendant by the plaintiff in renewal of that twenty-eight thousand dollar note, being the amount of the last mentioned note, with interest at the rate of two per cent. per month, and the amount of a check then given to the plaintiff by the defendant for the difference, for the payment of which note the defendant then held, as collateral security, sundry bonds of the Mineral Point Railroad Company, to the amount of sixteen thousand five hundred dollars, and eleven thousand dollars in bonds of the County of Iowa, which had been put in his hands, by the plaintiff, and also the Iowa County bonds for twenty-two thousand dollars, so originally pledged by Wilkins, making in all the sum of forty-nine thousand five hundred dollars.

Other loans, which may be considered as a distinct series,

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were also made to the plaintiff by the defendant from time to time, under their usurious agreement, for which sundry notes, including interest upon the sums loaned, after the rate of two per cent. per month, were given by the plaintiff, collaterally secured by drafts drawn by the president of the Mineral Point Railroad Company upon its treasurer, payable at future dates. In November, 1857, all the last-mentioned notes, with the interest, were found to amount to thirty-five thousand eight hundred and eighty-two dollars; and it was then agreed between the plaintiff and the defendant, that those notes should be given up and cancelled; that the plaintiff should give his promissory note at six months to the defendant for the eight hundred and eighty-two dollars; that, for the balance, the defendant should receive from the plaintiff, and hold in absolute ownership, nine certain drafts, dated and payable at Mineral Point, in the State of Wisconsin, drawn by the president of the Railroad Company upon its treasurer, and accepted by him, amounting in the aggregate, to thirty-five thousand dollars; and that the plaintiff should, by a separate instrument in writing, guaranty the payment of such drafts. The plaintiff's notes were thereupon given up, and cancelled, the drafts were delivered to the defendant, and the guaranty executed to him. The note for eight hundred and eighty-two dollars was subsequently paid. Several months after this settlement, an agreement was made between the defendant and the Railroad Company, whereby the time of payment of those drafts was extended by the defendant, and, in consideration thereof, the company placed in his hands further securities as collateral.

The plaintiff brought this action to procure the delivery and cancellation of his thirty thousand dollar note, and of his written guaranty, and to obtain possession of the county bonds, and the bonds and acceptances of the railroad company, on the ground of the usury in the loan. His complaint set up, substantially, the foregoing facts; but did not allege that he has paid, or offered to pay, the principal sums loaned, and represented by such securities, or any part of it.

The judge before whom the cause was tried held that the plaintiff could not be considered as a borrower, within the meaning of the statute, of the eleven thousand dollars loaned by the defendant to Wilkins; and that as he had not offered to repay that sum with legal interest he was not entitled, either as the

owner of the Iowa county bonds, deposited with the defendant by Wilkins, or by virtue of any substitution in place, or subrogation to the rights, of the latter, or otherwise, to the relief prayed for, so far as concerned that eleven thousand dollars, or the securities pledged to secure its payment; and inasmuch as that eleven thousand dollars, with the usurious interest upon it, after a certain date, was included in the note for thirty thousand dollars given by the plaintiff upon settlement, and as the collaterals placed in the hands of the defendant were held, as an entirety, as security for the payment for the whole of that note, so that the Court could not determine what part or proportion of the securities was held for the payment of the eleven thousand dollars, and what portion was intended to secure the remaining nineteen thousand dollars, even if it were proper to make such severance, the plaintiff could not in this action have any relief touching that note, or the collaterals held by the defendant as security for its payment.

In respect to the other series of loans, terminating in the transfer to the defendant of the drafts of the railroad company, the judge held that the transfer by the plaintiff to the defendant of the drafts of the railroad company to be held by him absolutely as owner; the plaintiff's separate written guaranty of the payment of those drafts; and the giving up and cancelling of the thirty-five thousand dollar note, in consideration of such absolute transfer and guaranty, operated as a payment and extinguishment of that note, and terminated the relation theretofore existing between the parties as borrower and lender; and hence that the plaintiff was not entitled to the relief granted by the statute.

In accordance with this decision a judgment was entered dismissing the complaint with costs.

James C. Carter, for plaintiff appellant.—I. The plaintiff was at least entitled to a decree that the note should be surrendered and cancelled, and prosecution on it enjoined.

This point is not answered by saying that the plaintiff had a perfect defence at law to the note. This objection should have been insisted on in the answer. The defendant waived it by putting his defence upon the merits alone (*Gilbert's Practice in Chancery*, p. 220; *Ludlow v. Simond*, 2 *Caines' Cases in Error*, 40; *Grandin v. Leroy*, 2 *Paige*, 509; *Fulton Bank v. N. Y. & Sharon Canal Co.*, 4 *Paige*, 132; *Cumming v. The Mayor, &c.*, 11 *Paige*, 596; *Hawley v. Cramer*, 4 *Cowen*, 726; *Under-*
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hill v. Van Cortlandt, 2 *Johns. Ch.*, 339; Truscott v. King, 2 *Seld.*, 147; Leroy v. Platt, 4 *Paige*, 77 Wiswall v. Hall, 3 *Paige*, 313).

II. He was also entitled to a decree to the same effect in reference to the written guaranty and his own note for eight hundred and eighty-two dollars.

III. The plaintiff is certainly entitled to a decree, that the county bonds, and the railroad mortgage bonds pledged by himself to secure the payment of the moneys borrowed by himself from the defendant, should be restored to him, or that the defendant account to him for the proceeds, or the value of them, in case he has parted with them.

IV. Without reference to the provisions of the Revised Statutes, or the Act of 1837, but upon the general principles of equity, a court of chancery would never have imposed upon the plaintiff as a condition of granting him its relief in respect of the particular securities which he himself had pledged to secure the loans to himself, the payment of what was due on the Wilkins loans. *A multo fortiori* should such a condition not now be imposed.

V. But the plaintiff was entitled to a decree for the cancellation of the thirty thousand dollar note of July 30th, 1857, and the surrender of *all* the securities mentioned in it, for the reason that he was the "borrower" as to all the loans embraced in it. And this on the assumption that the Wilkins loans were never, in fact, paid.

1. The term "borrower," in the provisions of the R. S. and in the statute of 1837, is to be construed to embrace a surety liable on the original contract.

This construction proceeds upon the reasonable ground that term "borrower" is used as the correlative of "lender" to indicate the party liable on the contract. (*Perrine v. Striker*, 7 *Paige*, 598; *Cole v. Savage*, 10 *Id.*, 583; *Post v. Bank of Utica*, 7 *Hill*, 391; *Morse v. Hovey*, 9 *Paige*, 197; *Hungerford's Bank v. Dodge*, 30 *Barb.*, 626).

VI. But further, the plaintiff was the "borrower" as to *all* the loans embraced in the thirty thousand dollar note, in the strictest and narrowest sense which can be given to that term.

VII. If it were necessary for our purpose to maintain that the loan to Wilkins was in this manner actually paid, we should not hesitate to do so. Should the defendant now bring

an action against Wilkins in any form for the amount of the eleven thousand dollars, a plea of payment would be abundantly sustained by proof of the facts found by the Special Term.

VIII. We may concede that by the transaction of November 2d, 1857, the relation of borrower and lender between the plaintiff and the defendant, as to the loans made on the acceptances, was terminated; but this makes the conclusion, which we think has been entirely established on other grounds, quite irresistible, namely, that the Wilkins loan was extinguished by the transaction of October 15th, 1856, and that by necessary consequence, the plaintiff was the "borrower" as to all the loans embraced in the thirty thousand dollar note of July 30th, 1857, and is entitled to have it cancelled, and to have the securities pledged for its payment restored, and an account of the proceeds or value of such as the defendant has parted with.

IX. It follows from this, that the judgment appealed from should be reversed; and as this result is reached without questioning the conclusions of the Court below on matters of fact, the plaintiff is entitled to a decree to the above effect, without a new trial (*Marquat v. Marquat*, 12 *N. Y.* [2 *Kern.*], 336; *Hannay v. Pell*, 3 *E. D. Smith*, 432).

David Dudley Field, for defendant respondent.—I. There are two fundamental rules of courts of equity, which should prevent the plaintiff from recovering in this action:

The first is, that when a plaintiff seeks equity, he must first do equity; and the second, that he cannot come into equity, if his remedy is complete at law (1 *Story's Equ. Jurisp.*, § 33, 49, 64, e.; *Willard's Equ. Jurisp.*, 44 to 49).

II. The statute of 1837 does not give a right to come into a court of equity if there was no right before. It only dispenses, in favor of a borrower, with one of the conditions on which he could obtain relief, that is to say, that one which required him to offer to repay the money borrowed, before he could obtain a recognition from the court (Act of 1837, chap. 430, § 3, 4, 5; *Minturn v. The Farmers' Loan and Trust Co.*, 3 *Coms.*, 498; referring to and approving *Perrine v. Striker*, 7 *Paige*, 598; *Morse v. Hovey*, 9 *Paige*, 197; *Post v. Bank of Utica*, 7 *Hill*, 391 [approved, 2 *Coms.*, 131], in which the

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contrary decision in the case of *Cole v. Savage*, 10 *Paige*, 583, is overruled; *Boughton v. Smith*, 26 *Barb.*, 635).

III. As to the eleven thousand dollars, borrowed by Wilkins, the *plaintiff* is, by his own showing, *not a borrower*. He is therefore not within the statute of 1837, and must do equity, if he would have equity. To the extent, therefore, of eleven thousand dollars, with the interest on it, the plaintiff can sustain no action here without offering to repay. And inasmuch as that sum is included in the thirty thousand dollar note, and he made no offer of repayment, he was properly denied relief as to that note (*Rexford v. Widger*, 2 *Comst.*, 131; *Sands v. Church*, 2 *Seld.*, 347; *Schermerhorn v. Talman*, 14 *N. Y.*, 126; *Curtis v. Leavitt*, 15 *Id.*, 254).

IV. If the plaintiff's allegations were true, he had a perfect defence against any action which could be brought against him, and a right, by a legal action, to recover back any of the securities if the pledge of them was really illegal (*Causland v. Davis*, 4 *Bosw.*, 619).

In such actions the parties would not lose their constitutional right of trial of jury (*Schroeppel v. Corning*, 2 *Seld.*, 107).

When this action was brought, the thirty thousand dollar note and the thirty-five thousand dollars of acceptances had been long past due, and therefore could not be passed, so as to give a holder any new rights. This consideration of itself was sufficient for dismissing the complaint (*Folsom v. Blake*, 3 *Edwd. Ch. R.*, 442 and 445; *Vilas v. Jones*, 1 *Coms.*, 278).

V. The nine acceptances being dated and made payable in Wisconsin are governed by the laws of that State (*Berrien v. Wright*, 26 *Barb.*, 208; *Cutler v. Wright*, 22 *N. Y.*, 474; *Potter v. Tallman*, 35 *Barb.*, 182), and by that are presumed to be valid. If that law prohibited them, it should have been proved.

VI. These acceptances being, moreover, given in payment, cannot be recovered back.

VII. The plaintiff's guarantee given for these acceptances must follow the fate of the principal obligations (*Scott v. Johnson*, 5 *Bosw.*, 213).

VIII. The same rule applies to the county and second mortgage bonds held as collateral for the note. If the note cannot be obtained by the plaintiff in this action, neither can the collaterals.

BY THE COURT.—BOSWORTH, CH. J.—I. The eleven thousand dollars first loaned were borrowed by Wilkins; Beecher was not originally connected with the loan as principal, agent, or surety. The plaintiff, subsequently to the loan, bought of Wilkins the interest of the latter in the contract to construct the Mineral Point Railroad; and the securities originally pledged to secure the payment of the eleven thousand dollars, and assumed the payment thereof, and so informed the defendant.

The plaintiff, therefore, was not, in fact, a borrower from the defendant of the eleven thousand dollars; nor is he a borrower of it within the meaning of the Act of 1837 (chap. 430; *Schermerhorn v. Talman*, 14 *N. Y.*, 93, 126, 131).

He cannot reclaim those securities without paying the eleven thousand dollars and interest thereon; and by assuming the payment of it, as part of his contract of purchase, is personally liable to pay it (*Hartley v. Harrison*, 24 *N. Y.*, 170; *Burr v. Beers*, *Id.*, 178; and *see Murray v. Judson*, 5 *Seld.*, 73).

II. The complaint should not have been dismissed at the trial merely because it did not contain an offer to pay the eleven thousand dollars. The plaintiff was entitled to a judgment that, on paying that sum with interest and the costs of the action, the securities originally pledged for the payment of it should be surrendered to him (*Schermerhorn v. Talman*, *supra*, 129, 142 and 143).

III. The securities subsequently pledged, as well to secure a usurious loan made at the time of the pledge, as the original loan of eleven thousand dollars, cannot be retained as security for the payment of the eleven thousand dollars. The taint of usury destroys the whole security; makes the contract void *in toto*, and in every of its parts. The plaintiff has an unqualified right to a restoration of all such securities (*Rice v. Welling*, 5 *Wend.*, 595; *Jackson v. Packard*, 6 *Id.*, 415; *Hammond v. Hopping*, 13 *Id.*, 505). The cases last cited are decisive, that the note for thirty thousand dollars is void. It should be given up.

IV. There is no consideration for the guaranty except the usurious loans, in payment of which the acceptances to which the guaranty relate, were received. The acceptances themselves being delivered and accepted as payment, the defendant has a right to retain them. The obligation or note of the plaintiff for the sum thus paid, if received alone, would be

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clearly void under the decisions above cited. It is difficult to perceive that a guaranty of the payment of the notes, received in payment, is not as clearly void. That must be surrendered.

The judgment must be modified to conform to these views, and, as thus modified, affirmed. If the parties cannot agree what securities were originally pledged to secure the payment of the eleven thousand dollars only, so as to specify them in the judgment to be entered hereon, there must be a reference to ascertain and identify them.

No costs of this appeal will be given to either party. Neither party has wholly succeeded on the appeal.

FOSTER *against* WOOD.

New York Common Pleas ; General Term, January, 1866.

SUMMONS.—AMENDMENT.—JUDGMENT AGAINST JOINT DEBTORS.—
ENFORCING JUDGMENT AGAINST DEBTORS' PERSONAL
REPRESENTATIVES.

The omission to serve a copy of the complaint together with the summons, where the summons is in the form appropriate for serving both together, and to state in the summons the place of filing the complaint, does not affect the validity of the judgment entered thereon. It is amendable.

Where the action is against joint debtors, a part of whom only are served, such defect in the summons is no reason for dismissing proceedings to enforce the judgment against those not served.

A judgment entered against several joint debtors upon service of summons upon only a part of them, is a judgment in form only, as against those not served.

The defendants not served are not "judgment debtors" within the meaning of the provision of the Code of Procedure (§ 380), which authorizes summoning the representatives of a deceased judgment debtor to show cause why the judgment should not be enforced against his estate in their hands.

The proper remedy of the judgment creditor in such a case, is to present his demand to the executors or administrators, and if they refuse to pay it, or to refer the claim, to bring his action thereon.

Proceedings to enforce a judgment against the representatives of a deceased defendant.

Foster v. Wood.

The plaintiff, Amasa S. Foster, summoned Rufus H. Wood, administrator, and Sarah E. Messer, administratrix, of Willard Messer, deceased, to show cause why a judgment he had recovered should not be enforced against the estate. The facts are fully stated in the opinion. The case was argued at General Term, in October, 1863, the first time. Later, a motion was made for a re-argument, which was granted. It was again argued in March, 1865.

Augustus F. Smith, for the appellant.

John M. Emerson, for the respondent.

BY THE COURT.—DALY, F. J.*—An action was brought by the plaintiff against William Leavenworth and Willard Messer, in the life time of Messer, upon a joint obligation entered into by them, in which action Leavenworth alone was served with process, and a judgment was entered up against both, in conformity with the provisions of the statute in relation to joint debtors (2 R. S., 377; Code, § 136). After the entry of the judgment, Messer died, and the plaintiff summoned his personal representatives, the defendants, to show cause why the judgment should not be enforced against the estate of Messer, in their hands, under the 376th section of the Code, which authorizes such a proceeding in case of the death of a judgment debtor after judgment. The defendants, in their answer, first denied the existence of any judgment, and then, as respects Messer, averred that he was not a judgment debtor; that as he had never been served with process, and had never appeared in the action, the judgment was not a judgment against him, except in form. The matter was referred to a referee, and he found, 1st. That the summons served upon Leavenworth was irregular, as it was in the form prescribed by law for the case in which a copy of the complaint is served with the summons, and that no complaint was served with it, nor did it state where the complaint would be filed. 2d. That Messer was not a judgment debtor of the plaintiff, and that the judgment was not a judgment against him, except in form.

The omission to serve with the summons a copy of the complaint, or, no complaint having been served, to state in the summons where it was or would be filed, did not render the judg-

* Present, DALY, F. J., and BRADY and CARDOZO, JJ.

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ment void. It was an irregularity, of which advantage should be taken by motion, for the court acquired jurisdiction by the service of the summons, and a defect like this, in the form of it, was amendable (2 *R. S.*, 424; *Hallett v. Righters*, 13 *How. Pr.*, 43; *Pequelet v. Darian*, 2 *Hill*, 584; *Martin v. Kanouse*, 2 *Abb. Pr.*, 393; *Cook v. Dickerson*, 1 *Duer*, 679; *Keeler v. Betts*, 3 *Code R.*, 183; *Bearson v. Earl*, 17 *Johns.*, 64; *Tidd's Practice*, 9th *Lond. Ed.*, 130, 1032; *Graham's Practice*, 2d ed., 132, 665). It was not a matter of which these defendants could avail themselves in this proceeding, and afforded no reasons for dismissing it.

As respects the second ground of defence, that Messer was not a judgment debtor, I think the referee decided correctly. It was held in *Oakley v. Aspinwall* (4 *N. Y.*, 513), that an attachment against a non-resident debtor could not be sustained upon the petition of the attaching creditor, stating that he had a demand against the debtor arising upon a judgment, where it appeared that the judgment was entered up, as authorized by the Revised Statutes (2 *R. S.*, 377) against the defendant as a joint debtor, without the service of process upon him. The ground taken by Justices BRONSON and MULLETT, was that the judgment, as respects the debtor not served, had no other effect than the statute gives it, which is that it may be collected out of the personal property owned by him jointly with the defendant, or any of the defendants served. That for all other purposes it was not even *prima facie* evidence of any indebtedness on his part. That it created no liability, and was a judgment merely in form, and though Justice JEWETT thought that the intention of the Legislature was to allow a remedy (an action) in form upon it, yet it had no force or effect as evidence of the plaintiff's demand against the defendant not served.

The Code of Procedure (§ 136 has provided for the manner in which a judgment may be entered against joint debtors, and enforced against the joint property of all, but it has not repealed the provisions of the Revised Statutes, which declare how far such a judgment shall be evidence of liability. It has provided (§ 375) that a joint debtor not originally summoned to answer the complaint may be summoned to show cause why he should not be bound by the judgment in the same manner as if he had been originally summoned; and has provided (§ 379) that he may make the same defences which he might have originally

made to the action, except the statute of limitations ; in this respect affording a mode for establishing his individual liability upon the judgment, and giving to the judgment in so far as he is precluded from the defence of the statute of limitations, more effect than it had under the Revised Statutes (*Bruen v. Bokee*, 4 *Den.*, 56).

In the same chapter and in the section immediately following, provision is made for summoning heirs, devisees, legatees and personal representatives, in a certain time after the death of a judgment debtor, to show cause why the judgment should not be enforced against the estate of the judgment debtor in their hands. This provision was manifestly intended as a substitute for the writ of *scire facias* to obtain execution upon final judgment after the death of the judgment debtor (*Alden v. Clark*, 11 *How. Pr.*, 213); and it appears from the notes of the codifiers, that the reason why it was incorporated in this chapter was because they had changed the form of proceeding in such a case, from *scire facias*, which was in the nature of an action, and made it comport with the proceeding against joint debtors, which is by a summons to show cause, that there might be a more easy and expeditious mode of procedure in such cases, than by *scire facias* (*First Report of Codifiers*, 1848, pp. 236, 237). There is nothing to indicate that it was the intention of the Legislature that a proceeding of this nature might be resorted to against the personal representatives of a deceased joint debtor, against whom a judgment had been entered without the service of process upon him, but, on the contrary, it is evident that what is meant by the term "judgment debtor" in this section is one against whom the judgment is conclusive and final. Upon *scire facias* the defendant could not plead any matter which he might have pleaded to the original action (*McFarland v. Irwin*, 8 *Johns.*, 77; *Cook v. Jones*, *Cowp.*, 727). And in this proceeding the personal representatives of the judgment debtor when summoned, are limited to a denial of the judgment, or the setting up of a defence which may have arisen subsequently (*Code*, § 379). The right of the party summoned to make any defence which he might have made to the action, is allowed only in proceedings under the 375th section ; and that section provides only for the summoning of a joint debtor to show cause why he should not be bound by the judgment. The one is a proceeding by means of which a joint debtor may be made a judgment debtor, the

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other a proceeding by which a judgment debtor's estate, after his decease, may be subjected to the payment of the judgment against him; distinct and different proceedings, and which are not to be confounded with each other.

That such was the intention of the Legislature is probable for another reason. There was no merger in the judgment, of the the original indebtedness, as against Messer. (*Oakley v. Aspinwall, supra*). He was a joint debtor and nothing more, and the rule is well settled that if one of the parties to a joint contract dies, his personal representatives are, in law, discharged from liability, and the survivor alone can be sued (*Grant v. Shuster, 1 Wend., 148*). Nor is there any remedy in equity, unless the survivor should be insolvent, which it is incumbent upon the judgment creditor to allege and prove (*Lawrence v. The Trustees of the Leake & Watts Orphan House, 2 Den., 587*).

Now in the proceedings provided for in the chapter under consideration, the judgment creditor merely serves upon the debtor a summons to show cause, and the debtor must answer within twenty days, setting up his defence, if he has any. That such a proceeding was not intended to apply to the personal representatives of a deceased joint debtor is obvious, as the very proceeding itself shows that they are, in law, discharged from all liability; and if they are chargeable in equity, then the burden is upon the judgment creditor to establish it by bringing an action. The proper remedy of the plaintiff was to present his claim to the personal representatives, and if they would not refer it, but disputed it, to bring his action (2 *R. S.*, 88, 89, §§ 35, 36, 37, 38).

The report of the referee should be confirmed.

Judgment accordingly.

BRETT *against* BROWNE.

Supreme Court, First District ; At Chambers, September, 1865.

* SUPPLEMENTARY PROCEEDINGS.—CONSTRUCTION OF STATUTE.

The affidavit to procure the examination of a third person in proceedings supplementary to judgment, under section 294 of the Code of Procedure, need not state that the property of the judgment debtor in his hands exceeds ten dollars ; the limitation of ten dollars applies only where the affidavit states that such person is indebted to the judgment debtor.

Motion to vacate an order for the examination of a third person, in supplementary proceedings.

The affidavit on which an order was made in this action for the examination of Abraham Morrell, as a third person having property of the judgment debtors, stated that he "has property of the judgment debtors," but failed to add "exceeding ten dollars." For this latter omission, the counsel for Morrell moved to dismiss the proceeding, citing *Lee v. Heubeger* (1 *Code R.*, 38) ; *Seeley v. Garrison* (10 *Abb. Pr.*, 460).

W. P. Richardson, for plaintiff.—Neither of these cases are applicable to this point. It is manifestly sufficient if either fact exist and appear on the face of the affidavit. The two propositions are stated in the statute disjunctively, viz : "Has property," or "Is indebted ;" the limitation of ten dollars being connected with the latter only.

INGRAHAM, P. J.—The affidavit in this case on which proceedings were commenced to examine a person having property in his possession belonging to the debtor, merely stated that the witness had property of the judgment debtor in his possession. A motion is now made to dismiss the proceeding, on the ground that the affidavit did not state that the property was worth ten dollars.

The 294th section of the Code says that the proceeding may

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be taken "on an affidavit that any person has property of the judgment debtor, or is indebted to him in an amount exceeding ten dollars."

The grammatical reading of this sentence undoubtedly is to separate the two branches of the sentence, so as to make it read, 1st, where the person has property of the judgment debtor; and 2d, where the person is indebted in an amount exceeding ten dollars; and such appears to me, to be the proper construction of the section. I have not been able to find any decision on this question, and I have acted on the supposition that the limitation applied to both portions of the sentence; but my attention has not before been called to this particular objection. In section 297 no limit is placed on the order directing the application of the property to the satisfaction of the judgment. There may be reason for not requiring small debts under ten dollars to be made liable to such a proceeding; while property of any value, in the possession of a third person, may be thus made liable. The property could be levied on under an execution, while the debt could not be, and the expense of collecting such small debts would be almost as much as the debt itself.

It is difficult to say what the intent of the Legislature was in this matter, without any thing in the context to throw any light upon it, and I think it better, therefore, to adhere to the ordinary construction of the language, so as to apply the limitation of ten dollars to the indebtedness only, and not to the value of the property which a third person may have in possession. Under these views the affidavit is sufficient, and the witness must submit to examination.

affirmed
46 March 1865

KETCHUM *against* KETCHUM.

Supreme Court, First District; Special Term, November, 1865.

ATTACHMENT.—RIGHT OF THIRD PARTY TO MOVE AGAINST.—
MOTION AFTER JUDGMENT.

It seems that in an action between partners for a dissolution of the firm, an accounting, and the payment of an alleged balance, an attachment cannot be issued, though the defendant be charged with fraudulently disposing of the property of the firm.

A mere creditor without judgment, though he has commenced an action and procured the issue of an attachment, cannot move to set aside a prior attachment irregularly issued against the property of the same debtor, and levied before his action was commenced.

Whether, after judgment, the regularity of the attachment can be inquired into in a collateral proceeding, *Quere?*

Motion to vacate an attachment.

All the members of the firm of Ketchum, Son & Co., except Edward B. Ketchum, commenced an action against him, charging him with having fraudulently disposed of the funds and property of the firm, and praying for a dissolution of the firm, the appointment of a receiver, and an accounting of the effects of the firm and of the partners therein, and that the balance due by the defendant might be recovered. This action was commenced by attachment against the defendant, under which his property was seized by the sheriff. Subsequently two actions were commenced by Isham and others against the whole firm, and attachments issued in both cases against the property of Edward B. Ketchum. The plaintiffs in the two actions brought by Isham & Co., now moved to set aside the first attachment issued in favor of Morris Ketchum & Co., upon the ground that no attachment could properly be issued in that action. Judgment was recovered in the first action before this motion was made. It did not appear that judgment had been entered in either of the other actions when this motion was made.

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INGRAHAM, P. J.—It may well be doubted whether this action is one contemplated by the 227th section of the Code of Procedure. It is not an action for the recovery of money, but ~~one~~ for the dissolution of the firm and the settlement of its affairs, and of the accounts of the several partners with the firm. What the result of that accounting will be, cannot be told, much less sworn to, until after the account is taken; and the result of the action ordinarily would be a dissolution of the firm, the appointment of the receiver, and, after the accounting, an order or judgment directing those defendants who were indebted to the firm to pay to the receiver the amount found due from them respectively, after crediting them with their share of the assets of the concern. Instead of this there appears to have been a judgment dissolving the partnership, appointing receivers, and directing an account, and, on the coming in of the report of the referee, a judgment that the plaintiffs recover to the use of the receivers the amount reported due from the defendant to the firm. It is not necessary for me now to inquire into the propriety of such a judgment, except so far as to say that it is not in one of those actions contemplated by the section of the Code before referred to. It is not an action brought for the recovery of money, nor is it possible for the plaintiff to state the amount of the claim, as required by the 229th section. Each partner has a right to the possession of the partnership property, and until the dissolution of the firm, there can be no indebtedness from one partner to the firm, which could be the foundation of an action.

But there is a difficulty in the way of the parties making this motion which is conclusive against it, viz.: that the plaintiffs in the second and third suits are not judgment creditors, and therefore are not in a condition to attack the prior attachments. The mere claim to be a creditor is not sufficient to authorize them to move to set aside prior liens. That can only be done, if at all, by judgment creditors. Their right as creditors must be established by a judgment before they can make such motions. The same rule which applies to motions to set aside judgments and executions applies to similar motions to set aside attachments, viz.: that the moving party, if other than the defendant, must have a lien on the property by a judgment, or have his right to be considered a creditor established in that mode, before he can make the motion. It must

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be apparent that he is injured by the attachments, before he can move to vacate them. Whether even after judgment, the regularity of the attachment can be inquired into in a collateral proceeding is not by any means clear. A contrary opinion was expressed in *Re Griswold*, 13 *Barb.*, 412. It is not necessary, now however, to decide that point. The present motion must be disposed of on the ground that a mere creditor before judgment cannot move to set aside an attachment issued in another action, and levied before his action was commenced.

The motion is denied with ten dollars costs

FORD *against* TOWNSEND.

New York Superior Court; General Term, May, 1863.

BOND FOR PAYMENT OF JUDGMENT.—EFFECT OF APPEAL.—WAIVER.

Where a bond with sureties was given by one of several defendants, against whom a personal judgment had been recovered, conditioned for the payment of the amount of the judgment whenever ordered by the final decision of the court, such bond being given as a condition imposed by the court for refusing to appoint a receiver of specific property, upon which the judgment against the defendant had been declared to be a lien;—*Held*, that it was no defence to an action on such bond, that upon an appeal the judgment was subsequently modified by reversing it so far as it imposed any personal liability upon the defendant who gave such bond, and affirming it as to the others.

The voluntary act of the obligors in giving such a bond under an order which affords the party his election to give it or not, is a waiver of any objection to the authority of the judge making the order, to require such a bond.

Appeal from a judgment in favor of the defendants Samuel P. Townsend, Tappen Townsend and Thomas Wilber, entered upon an order dismissing the complaint upon the trial before Mr. Justice PIERREPONT on the 4th of October, 1860.

The action was brought by Samuel Ford, upon a penal bond given by the defendants in compliance with an order of court, made in a previous action against the defendant Townsend, and two other persons, David and Turner, which order directed the appointment of a receiver unless the defendants in that action should give such bond.

The object of the prior action, which was brought by the plaintiff in this action, was to recover the sum of thirty-one hundred dollars, with interest, and to have the payment thereof adjudged a lien upon the property mentioned in the bond upon which this action is brought. The plaintiff recovered a judgment for that relief and directing the appointment of a receiver if execution should be returned unsatisfied. On a subsequent application by the plaintiff for the immediate appointment of a receiver without waiting for execution, the court ordered that the defendants in that action should give a bond with two sureties for the payment of the sum recovered, and in case they should do so the lien should cease; but if they did not, a receiver should be appointed. The bond on which this action was brought was accordingly given by the present defendants; but on appeal the judgment in the former action was subsequently modified by reversing it so far as it adjudged the defendant Townsend personally liable; but affirming it as to the other defendants, and as to the appointment of the receiver.

The present action being brought upon this bond, the answer of two of the defendants, Samuel P. and Tappen Townsend, the only ones served with process in this action, put in issue the judgment alleged in the complaint to have been recovered March 15, 1856, and the application and order therein stated, and the legality of the same. It admitted that they, conjointly with Wilbur, executed a bond, but put in issue the one stated in the complaint. It denied that upon the execution of the bond that was executed, Samuel P. Townsend took possession of the property, but alleged that the plaintiff eloiigned a part of the same. They denied by their answer that this court ever rendered any such final decision as alleged in the complaint, or by any decision ordered the defendant Samuel P. Townsend to pay anything whatever to the plaintiff, or by any decision ordered either of the obligors to said bond to pay him anything

whatever, or that it has by any final decision ordered the defendants in said alleged action to pay him anything.

They insisted that this court, by its final decision, rendered about October 17, 1857, in said action, upon an appeal duly taken, adjudged and decided that said judgment was erroneous and void, among other things, in so far as it held that Samuel P. Townsend was bound to pay, or that the plaintiff was entitled to recover against him any sum whatever, and that said judgment was in these respects reversed.

They denied notice of the alleged final decision, and demand of payment; and alleged that the judgment first referred to in the complaint was not lawful; and denied the right of the judge to order the giving the bond in suit, and charged that the same was given under duress.

When the action was called on for trial a motion was made to dismiss the complaint, which being denied, defendants excepted.

This motion was renewed after the plaintiff had given his evidence and rested; and then was granted. To which exception was taken by the plaintiff's counsel.

W. W. Northrop, for plaintiff appellant.—I. The justice erred in non-suiting the plaintiff.

(a.) The action was properly brought in the name of Samuel Ford as plaintiff, for the bond was given to him (*Stillwell v. Hurlbert*, 18 *N. Y. Rep.*, 374; *Slack v. Heath*, 4 *E. D. Smith's Rep.*, 95, 101-4). (b.) The defendants have waived the right to question the plaintiff's right to sue, by not setting up in their answer that he is not the real party in interest (§ 148 of the *Code of Procedure*). And the defendants are estopped from denying the matters recited in the bond executed by them (1 *Greenleaf on Evidence*, § 26; *Sinclair v. Jackson*, 8 *Cow.*, 544, 586; *Jackson v. Harrington*, 9 *Id.*, 86, 128; *Jackson v. Brooks*, 8 *Wend.*, 426, 434).

II. The defendant's covenant to pay or cause to be paid to the plaintiff the sum awarded to be due him by said judgment, and all costs and charges ordered to be paid to him thereupon, whenever ordered by this court by its final decision, is independent of and inconsistent with the liquidation of the plaintiff's claim from the proceeds of said property.

III. The defendants are estopped from raising the objection

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that a receiver has not been appointed to take possession of said property, and to sell the same, and pay over the proceeds to the plaintiff in discharge of his claim.

S. Sanxay, for defendants respondents.—I. The complaint contained no cause of action, and should have been dismissed when *first* asked for; and the order dismissing it, though afterwards made, should be affirmed.

II. It was properly dismissed, when finally moved for, after the court had given the plaintiff a full opportunity to make out a case.

III. The action, if one existed, could only have been brought upon the penalty of the bond.

IV. The bond was joint, and not several (1 *Shepherd's Touchstone*, 375; *Ehle v. Purdy*, 6 *Wend.*, 629).

By suing the defendants jointly, plaintiff has elected to treat the bond as a *joint* one; and he could proceed, had he made a different election, *only* against *each severally*, or against *all* together (Per BULEER, J., in *Streatfield v. Halliday*, 3 *T. R.*, 782; see, also, *Cabell v. Vaughan*, 1 *Wms.' Saunders*, 291, f. n.; also, *Bangor Bank v. Treat*, 6 *Greenl.*, 207).

V. In an action like this, the plaintiff must recover against *all*, or none. He could not possibly do so here, for Wilbur had not been served with process, nor appeared (See *Downey v. Farmers' and Mechanics' Bank*, 13 *S. & R.*, 288). And, not being served with process nor appearing, he is not a party (*Robinson v. Frost*, 14 *Barb.*, 537).

VI. The condition of the bond is not broken. Sureties are *the favorites of the law* (*Moore v. Paine*, 12 *Wend.*, 126), and their engagement cannot be extended beyond the *very terms* of their contract (*Whitcher v. Hall*, 5 *B. & C.*, 269; *Miller v. Stewart*, 4 *Wash. C. C. R.*, 26; affirmed on appeal, 9 *Wheat.*, 680; *Walsh v. Bailie*, 10 *Johns.*, 180; *Wright v. Johnson*, 8 *Wend.*, 516; *Evans v. Whyte*, 5 *Bing.*, 484; *S. C.*, 1 *Moo. & Mal.*, 468; cited by *Pitman on Principal and Surety*, 34; *Campbell v. French*, 6 *T. R.*, 200; *Arlington v. Merrick*, 2 *Saund.*, 403; 4 *Taunt.*, 593).

VII. The complaint should have stated *specific* breaches for which the action is brought (2 *R. S.*, 378; 7 *Wend.*, 345; 4 *Wend.*, 570; *Juliand v. Burgott*, 11 *Johns.*, 6; *Drummond v. Husson*, 4 *Kern.*, 60; *Nelson v. Bostwick*, 5 *Hill*, 37).

VIII. The promise of performance in the bond is joint, and not several; and there is but one thing to be done, and there can be no severance in the action (*Chitt. Pl.*, 6 Ed. 47; *Platt on Cov.*, 117; *Marshall v. Smith*, 3 *Shepley*, 17).

IX. Bonds must be taken always most strongly in favor of the obligor. The *condition* is considered the language of the obligee (Per BALDWIN, C. J., and FITZ HERBERT, J., in *Bold v. Molineux*, 1 *Dyer*, 14 b., 17 a.; see, also, 1 *Shepherd's Touchstone*, 375, 376; *Powell on Contracts*, 396, 397; *Laughter's Case*, 5 *Rep.*, 22).

X. The liability of a surety cannot be more than that of the principal, upon the particular transaction or contract, in regard to which the relation of surety was created. *And Samuel P. Townsend, the principal, is freed from liability* by the final decision of the general term; and the absurd idea is now advanced of making him liable, notwithstanding.

XI. A liability can only be incurred in the mode provided (*Drummond v. Husson*, 4 *Kern.*, 60; *Bulkley v. Lord*, 2 *Starkie*, 406), and it cannot be argued that any such liability has arisen here.

XII. The judge had no legal right to require any such bond to be given, and it is void (*U. S. v. Hipkin*, 2 *Hall's Amer. Law Jour.*, 80); and this question can be raised collaterally (*Broadhead v. McConnell*, 3 *Barb.*, 176).

XIII. A bond may be discharged by parol (*Dearborn v. Cross*, 7 *Cow.*, 48). And that this was discharged, or never meant to be availed of, is clear, from the fact that the order directing it to be given was never made part of the judgment roll.

XIV. The complaint does not aver the bond to be sealed. This was necessary (*Van Santvoord v. Sandford*, 12 *Johns.*, 197; *Macomb v. Thompson*, 14 *Id.*, 207; *Stanton v. Camp*, 4 *Barb.*, 274).

XV. Where a number of defendants are named as joint defendants, the trial record must show all the parties to be before the court, and until then, the action is in no condition to be tried.

XVI. A condition precedent to any possible liability of defendants, even had the general term, by its final decision, decreed a liability of the defendants, was, that S. P. Townsend should be permitted to take certain personal property. Plain-

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tiff could not recover, unless he had averred and proved performance of this condition fully (*Oakley v. Morton*, 1 *Kern.*, 25). This point was in issue by the answer.

XVII. The condition is that the obligors will pay, whenever ordered by the final decision of this court. This means whenever they are ordered; but if it should be construed to mean, whenever either is ordered, there should have been an allegation and proof as to which obligor was ordered, and when, and how. S. P. Townsend only was, of these obligors, before the general term, and, of course, was the only one who could possibly have been ordered to pay; and he, it seems, was discharged from all liability to pay. It is fair to construe the bond thus, that the intent was that the bond should remain operative if the general term should hold S. P. Townsend to a personal liability; but if it should discharge him, the bond should, of course, be discharged also. It cannot honestly be assumed that the obligors of the bond meant to bind themselves, if the general term should hold any of the other parties liable; for if so, the bond would have said so; but by no latitude of construction can any such meaning be given to it (See, also, *Wells v. Baldwin*, 18 *Johns.*, 45).

XVIII. The action being treated as joint, and Wilbur not being served nor appearing, the plaintiff had no action when the cause was tried (4 *Hill*, 563; *Id.*, 35; and see *Burnham v. De Bevoise*, 8 *How. Pr.*, 159).

XIX. The judgment at general term is now the only judgment in the cause, and that provides several conditions and contingencies before the property in the Mercantile Hotel is liable to pay the plaintiff's claim; and that judgment discharged Townsend altogether, and by modifying and changing the judgment which was originally given, must be construed as discharging the order of Judge HOFFMAN, of December 17th, and everything else connected with it, which at all affected or modified it, including, of course, the bond given under that order.

XX. It was clearly proved that the plaintiff in this action had no interest in it, and was not the real party in interest, and had no right to sue under sections 111-113, of the Code.

BY THE COURT.*—MONCRIEF, J.—The exceptions to the admission of testimony, etc., taken by the defendants upon the

* Present, BOSWORTH, Ch. J., and MONCRIEF and WHITE, JJ.

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trial, cannot be considered upon this appeal. "The rule is to examine the decisions made by the (circuit) judge *against* the party who has lost the verdict, and to grant or refuse a new trial according as we find them erroneous or otherwise (*Else v. Metcalf*, 1 *Den.*, 323; *Rodgers v. Murray*, 3 *Bosw.*, 357).

It remains, therefore, only to be considered whether the facts adduced upon the trial, assuming them to be undisputed, would entitle the plaintiff to a judgment in his favor? Did the proofs upon which the plaintiff rested his case, constitute a cause of action against the defendants named in the action?

It appears that in the month of March, 1856, one of the justices of this court, in an action wherein the present plaintiff was the plaintiff, and Henry J. David, Don M. M. Turner, Samuel P. Townsend and John Johnson were the defendants, made a certain judgment or decree, wherein and whereby it was adjudged "by the court that the plaintiff do recover the sum of three thousand five hundred and eighty-six dollars, as well from the defendant Henry J. David, as from the defendant Don M. M. Turner, and from the defendant Samuel P. Townsend, respectively, such sum being the amount of three thousand one hundred dollars with interest, after deducting the amount of nineteen dollars and forty-three cents, etc., * * * and that the plaintiff have execution against the defendants David, Turner and Townsend severally, for such amount, being three thousand five hundred and fifty-six dollars and fifty-seven cents.

"And it is further declared and adjudged that the plaintiff *is entitled to*, and that he *has an equitable lien* upon the fixtures in such (Mercantile) Hotel, and what remains of the furniture comprised in the schedule to the mortgage, given by the plaintiff to David S. Jones.

"And it is further declared and adjudged that a *Receiver* be appointed to take charge of such furniture and fixtures and sell and dispose of the same for the payment of the said sum of three thousand five hundred and sixty-six dollars and fifty-seven cents, and the interest thereon, until the same be paid." * * * *

It also appears that on the 17th day of December, 1856, the said justice of this court, in the same action, "Ordered that the defendants give *security within twenty-four hours*, by a bond with two sureties in the penalty of five thousand dollars, conditional to pay to the plaintiff the sum of thirty-one hundred dol-

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lars, with interest and costs, or that a receiver be appointed forthwith of the hotel leases, furniture and fixtures mentioned in the plaintiff's complaint, and in case such security be filed by the defendants, the owner or owners of the said leases, furniture and fixtures, may do what they choose with the same, *and that the plaintiff's lien thereon shall cease.*" * * * *

Thereupon and on the 18th day of December, 1856, a bond was executed by the defendant in this action in the words and figures following, to wit:

"Know all men by these presents, that we, Samuel P. Townsend, of the City of New York, and Tappen Townsend, of the City of Brooklyn, and Thomas Wilbur, of the City of Brooklyn, are held and firmly bound unto Samuel Ford, of the City of New York, in the penal sum of five thousand dollars, lawful money of the United States. For which payment well and truly be made, we bind ourselves and our and each of our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals this 18th day of December, A. D., 1856. Whereas, by a certain order or judgment made at a special term of the Superior Court, held at the City Hall, in the City of New York, before the Hon. MURRAY HOFFMAN, one of the justices of said court, bearing date the first Monday of March, A. D., 1856, in a certain action in which Samuel Ford was and is plaintiff, and Henry I. David, Don M. M. Turner, Samuel P. Townsend and John Johnson are defendants, wherein and whereby it was adjudged that said defendants David, Turner and Townsend were bound to pay and said plaintiff was entitled to recover against them respectively the sum of three thousand five hundred and sixty-six dollars and fifty-seven cents, together with certain costs, amounting in the whole to a sum not exceeding four thousand three hundred dollars, subject to a certain liability of the said Ford to pay for certain rooms and the use thereof, in certain premises called the Mercantile Hotel, situate at Numbers 2, 4, 6 and 8 Warren street, in the City of New York, and also decreeing that said Ford had an equitable lien upon certain fixtures and furniture in said Hotel for the payment of said sum, as will more fully appear by the said judgment order, or judgment; and whereas, the said Ford did, on the 16th day of December, 1856, apply to the said justice, the Hon. MURRAY HOFF-

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was discharged; the order of course never was appealed from; **MAN** for a modification of the said judgment order, so that a receiver might be appointed to take charge of said property in said Mercantile Hotel, which is charged with said equitable lien, and said justice did thereupon, on the seventeenth day of said December, *order that said Townsend* be permitted to take said property and do with the same as he might see fit upon his executing a bond with two sureties, who should justify in the sum of five thousand dollars *conditioned* to pay the amount of *said recovery*, as by said order will more fully appear, reference being thereunto had :

“ Now the condition of this obligation is such that if the above bounden obligors, or any or either of them shall and will well and truly pay or cause to be paid to the said Samnel Ford the sum awarded to be due him by said judgment, and all costs and charges ordered to be paid to him thereupon, whenever ordered by the said Superior Court by its final decision, then their obligation to be void, and the obligors to be discharged, otherwise to be and remain in full force and virtue.

“ Witness our hands and seals the day and year first above written.”

[Signatures, &c.]

The order of the 17th of December, 1856, having been complied with by the execution, delivery and approval of the foregoing bond, Mr. Justice HOFFMAN discharged the lien of the plaintiff, and the injunction and order for a receiver was also discharged.

It also appears that an appeal was taken from the judgment, on the 1st Monday of March, 1856, to the General Term of this court, and thereafter, and in the month of October, 1857, the general term did render its final decision affirming the hereinbefore recited portions of the judgment so given and directed by the court at the special term held on the 1st Monday of March, 1856, and also directing, in view of the fact that the subsequent modification of the judgment (by the order of the 16th of December, 1856,) was not presented at the general term, that the proceedings for the appointment of a receiver be first perfected and concluded, and the said property *be sold* by the receiver, &c. * * *

This action was brought upon the aforesaid bond averring the facts hereinbefore stated, &c.

A demand was proven to have been made of the defendants Samuel P. Townsend and Tappen Townsend prior to the commencement of this action; no demand was made upon the defendant Wilbur, nor was he served with a summons, nor did he appear in this action.

A computation was made and presented at the trial, of the amount due to the plaintiff from the defendant in this action, the principal sum is, &c. * * *

Upon the facts thus presented, in my opinion, it is quite plain that the plaintiff was entitled to judgment; a perfect cause of action is shown; a breach of the condition of the bond upon which the action is brought was established; the recital in the bond shows that it was given as a substitute and in lieu of the equitable lien, which was adjudged to exist against certain furniture, &c., and it was "conditioned to pay the amount of said recovery," being a personal judgment against David, Turner and Samuel P. Townsend for the sum of three thousand five hundred and sixty-six dollars, and fifty-seven cents; it appears too that upon the delivery of this bond, the equitable lien, the injunction and order for receiver were discharged; that the court by its final decision, at the general term, in the month of October, 1857, did "order the sum awarded to be due to the present plaintiff by the said judgment made at the special term aforesaid, and all costs and charges ordered to be paid to him thereupon by sustaining and affirming such portions of the judgment below as fixed the amount of recovery, and gave to the plaintiff an equitable lien upon said furniture, &c., as security for its payment.

The objection that the order directing that a bond be given was without authority, the officer making the order having no power to make it, we are of opinion is not well taken—the plaintiff had an equitable lien upon the furniture &c., and an order had been made by which a receiver was to be appointed; an application appears to have been made to the court that a receiver be appointed forthwith, and thereupon the counsel for the defendant S. P. Townsend was heard, and the motion was granted *unless* he gave a bond; this he elected to do and gave the bond in question and the plaintiff's equitable lien

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the execution and delivery of the bond to the plaintiff was the voluntary act of the defendant, and was a waiver of defects if any existed (*Franklin v. Pendleton*, 3 *Sandf.*, 572).

The judgment should be reversed, and a new trial granted, with costs to abide the event.

TAYLOR *against* BROOKMAN:

Supreme Court, First District ; General Term, November, 1865.

INJUNCTION.—CAUSE OF ACTION.

An injunction will not lie at the suit of the owner of a wharf or bulkhead, having a mere easement in the nature of wharfage in respect to the land under water in front thereof, to prevent the erection of a pier or wharf by an adjoining owner under the sanction of public authority.*

* In the case of *THE PEOPLE v. THE HARLEM BRIDGE CO.* (*Supreme Court, First District ; Special Term, June, 1865*), it was *Held*, that the Court would not, upon a motion for a preliminary injunction, decide a question involving a forfeiture of corporate rights ; nor usually grant a preliminary injunction if there is to be a trial involving such important rights, unless it appears from the papers before the Court that serious injury will follow the refusal of it.

INGRAHAM, P. J.—The affidavits submitted in this case show that the present bridge over Harlem river is not the original bridge known as Coles' Bridge, nor the structure to be erected in place thereof, but a temporary bridge, built in the first instance by the Bridge Commissioners, and that the same was afterwards widened and strengthened by the Railroad Company, at an expense of about seven thousand dollars. It can hardly be claimed that this is Coles' Bridge, as charged in the plaintiff's complaint.

It is also shown that the Supervisors of Westchester County and the Bridge Commissioners have given permission to the Railroad Company to lay their rails over this temporary bridge during the pleasure of the Commissioners. There was no authority for the erection of this bridge in the laws relating to the subject, but it seems to have been necessary for the public convenience, and for carrying out the purposes of those acts ; and so far as public rights are involved it is difficult to say that the people possess any such rights in opposition to the acts of the Bridge Commissioners, unless

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If injured by such erection, his remedy is by an action for damages for the obstruction of his easement; or, if he can show title to the land on which the erection is made, by an action to recover possession thereof.

Appeal from an order denying a motion for an injunction.

The plaintiff, Moses Taylor, was the owner of a piece of land, being a portion of a tract formerly owned by him which was bounded by Nineteenth street on the north, by Seventeenth street on the south, by Tompkins street on the east, and by Avenue B on the west, and the title to which tract, by means of former conveyances from the owners of the upland and by grants of land under water from the Common Council of the city, had been vested in the plaintiff. In February, 1865, he sold and conveyed to the defendants, H. D. and J. U. Brookman, the block lying between Nineteenth and Eighteenth streets, and Avenue B and Tompkins street, together with all the water rights growing out of or in anywise appertaining thereto.

The plaintiff retained and still owns the piece of land lying between Eighteenth street on the north, the centre line of Stuyvesant street on the south, and a line one hundred and thirty-eight feet easterly of Avenue B and Tompkins street, with the water rights and privileges thereto appertaining, and including the right of wharfage and cranage thereon, at Tompkins street, which theretofore had been the exterior line of the said city on the river.

The rights of the several owners to the land under water between Tompkins street and the land adjoining had been settled and adjudicated.

By the act of 1826, ch. 166, Tompkins street was declared to

it be to insist on having the same removed as an unlawful obstruction of the river. This, I conclude, no one living in Westchester County would ask for.

As the defendants have expended so large a sum in erecting this temporary bridge, and have the consent of the Commissioners to lay their rails thereon, there can be no ground on which the Court could prohibit the use of it, unless it be on the ground of a violation of their charter in going beyond the limits allowed for the railroad.

As the decision of this question involves a forfeiture of their corporate rights, it is not proper to decide it on a preliminary injunction, and it is not usual to grant such an injunction where there is to be a trial involving such important results, unless it appears that serious injury will follow the refusal of it. The papers before me show no such necessity, and I am not at liberty to enquire beyond them to see if any such cause exists.

The motion for an injunction during the litigation of this action is denied.

be the exterior line, and all grants made or to be made by the Mayor, &c., thereby, were to be construed as rightfully made to extend thereto. Stuyvesant street had been laid out by the proprietors of the land there as a street, and the same had been recognized as such by the public authorities, but has since ceased to be one of the streets of the city east of the Second avenue, and that part has been closed.

The act of 1857, ch. 763, p. 638, established a bulkhead along the East river from Ninth street to Forty-ninth street; and provided for the erection of a sea wall on that line from Seventeenth street to Thirty-eighth street, with openings therein, and the water space was appropriated for piers, and bridges and wet basins. This act, however, gave no right to the city, in the land under water between Tompkins street and the sea wall, nor any to the proprietors of the land west of Tompkins street. The lines of the bulkhead and piers were by this act established according to the report of the Harbor Commissioners with some alterations therein stated, and all filling beyond the bulkhead line was prohibited.

In December, 1863, a resolution was passed by the Common Council granting permission to the defendants as owners of the real estate situate between Nineteenth and Twentieth streets, to fill in, erect and build the bulkhead to the exterior bulkhead line as established by the Harbor Commissioners, and also to erect and build to the exterior sea wall so established the pier at the end of said streets, of the usual dimensions, under the direction of the Street Commissioners. Plans and specifications were adopted and approved by the Street Commissioners.

Under this resolution and permission, the defendants have commenced building a pier from the foot of Nineteenth street, following the line of the street to the exterior sea wall, as established by the Harbor Commissioners. The location of said pier, when extended to the sea wall line, will cross between the land of the plaintiff and the sea wall, and would cut off a portion of the end of Stuyvesant street, if extended to the sea wall, and in this way deprive the plaintiff of his right to wharfage, &c., on his land in front thereof at the sea wall, to which he claims to be entitled.

He brought this action praying for an injunction restraining the defendants from erecting any pier or wharf in the waters of the East river beyond a line running easterly from the inter-

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section of Avenue C and the centre of Eighteenth street, parallel to the line of Stuyvesant street, as extended to the exterior line.

This motion was denied at special term, and the plaintiff now appealed therefrom.

John N. Whiting, for the plaintiff.

Gilbert Dean, for the defendants.

By THE COURT.—INGRAHAM, P. J.—It is not necessary, in disposing of this motion, to examine any of the questions which were discussed on the appeal, as to the relative rights of the parties to the land lying between Tompkins street and the upland. Those questions were settled when the grants were made by the city and accepted by the parties. All of the land under water west of Tompkins street was owned by the plaintiff, and the sale by him to the defendants, of the land between Eighteenth and Nineteenth streets, and Tompkins street and Avenue B, with the water rights attached thereto, changed the rights of the plaintiff or his grantors, as they originally existed as riparian owners, and gave the defendants the right and title to the land under water, or reclaimed from the water, within those boundaries, free from any right as riparian owner which the plaintiff or his grantors might have before possessed in that portion of the premises so conveyed. Such conveyances also gave the defendants the right of wharfage, etc., appurtenant to the land so conveyed, along the line of the bulkhead, as fixed by the Harbor Commissioners. But the right to wharfage, etc., which accompanied this grant, could only be directly in front and adjoining the land so conveyed, and gave the defendants no right or title to the wharfage, etc., south of a point formed by the intersection of the north line of Eighteenth street with the exterior line of Tompkins street. Whatever right and title the plaintiff had to wharfage and water rights as attached to the land owned by him south of that line, still remained his, and was unaffected by that grant.

The enquiry in this case need not to extend beyond the question which arises as to the right of the plaintiff as the riparian owner at Tompkins street, entitled to wharfage there, to extend that right to the sea wall, and to the intermediate space between the sea wall and Tompkins street.

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It does not appear in any of the papers submitted on this appeal, whether these piers are to be built on lines prescribed by the Harbor Commissioners or by the Common Council. If the Harbor Commissioners had laid out these piers as extensions of the streets to the sea wall, I do not see how any of the owners could successfully resist the execution of them. The legislature had power to direct such erection, or to permit the Common Council to provide for their erection. In the absence of any proof to the contrary, we must conclude that they are laid out in accordance with the law.

As before stated, the parties owning to Tompkins street have no right to the land under water east of that street, nor is their right to wharfage affected by the erection of piers outside of that line, so long as access is afforded to the bulkhead. This is provided for by the opening to be made in the sea wall when erected. Under the decision made in *Marshall v. Guion* (11 *N. Y.* [1 *Kern.*], 461), the corporation would have the power to direct piers to be sunk in front of the streets in such manner as they in their discretion should think proper, and the individual proprietors who might build a bulkhead to be used as a public street, and to be entitled to the wharfage thereon, would not acquire a right to construct piers projecting from that bulkhead. DENTON, J., says: "It is not the ownership of a lot, but a mere easement. If injured by the erection of other piers, they might be entitled to damages," but not to prevent the erection of piers beyond their property, and which do not, in fact, prevent the collection of wharfage upon their own portion of the bulkhead.

It seems to me, however, that this appeal must be disposed of on other grounds. When the plaintiff has no right to the land under water over which it is proposed to build this pier, he ought not, by injunction, to prevent the erection of what has been decided by public authority to be necessary and proper to the public use. His property is not invaded. He has nothing but a mere easement which may be affected, and it does not appear that even that will be interfered with by this pier. He must show an undoubted right to what he claims before he can ask a court of equity to aid him in maintaining it.

There is also another reason why a public improvement should not be stayed by injunction, as in the present case. It is that the plaintiff has an ample remedy by action. If he is

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injured by the erection of this pier, he may recover a compensation in damages therefor; and if he can make out any title to the land over which any part of the pier is built, he can, in like manner, recover the same by ejectment. The erection of it would not injure him. He has no authority to build any pier over this space; and as a different plan has been adopted by the Common Council, it is not probable that such plan would be changed so as to permit an erection of a pier on a line parallel with Stuyvesant street, more especially as that street has been discontinued and closed.

There is nothing in the cases between the owners of the upland, as set out in the complaint, which can be considered as any adjudication upon the questions before discussed. Those cases related to the rights of the parties in the lands between Tompkins street and the shore. The decisions there made cannot be made applicable to this case, in which neither the plaintiff nor the city have any title to the fee, and where the action is brought merely to protect a right to wharfage, and not any title to the land itself.

My conclusion is that the plaintiff is not entitled to an injunction as prayed for, but that he must be left to his remedy, if he is damaged by the erection of this pier, either by an action for damages, or by ejectment, or such other mode as he may be advised.

The order appealed from should be affirmed with ten dollars costs.

WILSON *against* MORGAN.

New York Superior Court; General Term, February, 1866.

TENDER.—SPECIFIC PERFORMANCE.—MEASURE OF DAMAGES.—
CONTRACT PAYABLE IN SPECIE.

* Under the Act of Congress of February 25, 1862 (12 U. S. Stat. at L., 711), making the notes issued by the United States, "lawful money, and a legal tender in payment of all debts, public and private, within the United

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States;²—a contract for the *payment* of a sum in gold and silver dollars is satisfied by payment in such legal tender notes.

Thus, where a charter party was made in a foreign country, subsequent to the Act, with a stipulation that the freight was to be paid, if cargo were discharged in the United States, in gold and silver dollars, or by approved bills on London;—*Held*, that freight on discharging cargo here could be paid in legal tender notes.

The claim for the freight is a debt of the consignor, within the meaning of the Act, and the consignee may discharge it by payment in such notes.

A contract to *pay* money in gold and silver cannot be specifically enforced, nor can any other damages be recovered, upon its breach, except interest.

The plaintiffs, John Wilson and others, owners of the British ship *Atalanta*, by their agents, George Henderson & Co., in Calcutta, chartered a ship to Gillanders, Arbuthnot & Co., of Calcutta.

The charter party was made in Calcutta, and is dated January 20, 1863. It contains the following clause:—"The freight to be paid on unloading and right delivery of the cargo as follows, viz: if discharged in United States of America, in silver and gold dollars, or by approved bills on London; if at a port in United Kingdom, as customary." Edwin D. Morgan and others, the defendants in this action, were the consignees of the cargo.

Upon the arrival of the vessel at the port of New York, in June, 1863, the defendants tendered payment of the freight, amounting to thirty-two thousand six hundred and thirty dollars, in United States legal tender notes. The tender was refused and payment demanded in silver and gold dollars, as specified in the charter party, which was refused; and the plaintiffs brought this action.

The action was tried by a referee, who found the tender of the United States legal tender notes, and that at the time of such tender, the market value thereof was thirty-three and one-eighth per cent. less than that of gold or silver dollars.

By an arrangement between the parties the plaintiffs credited the defendants with the market value of the amount tendered, leaving a balance of seven thousand six hundred and eighty-four dollars and fifty-seven cents due.

The referee found the market value of such balance was, in the currency of the United States, ten thousand two hundred and thirty dollars and eight cents.

Upon these facts the referee decided that the plaintiffs were entitled to recover said sum of ten thousand two hundred

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and thirty dollars and eight cents, with interest, and rendered judgment accordingly.

The defendants now appealed.

E. Terry, for the appellants.

A. F. Smith, for the respondents.

BY THE COURT.—MONELL, J.—The Act of Congress, passed February 25, 1862, provides that the notes by that act authorized to be issued shall be "lawful money, and a legal tender in payment of all debts, public and private, within the United States, except," &c. (12 *United States Statutes at Large*, p. 711). The validity of the act is not open for discussion in this State (*Metropolitan Bank v. Van Dyck*, 27 *N. Y.*, 400; *Meyer v. Roosevelt*, *Id.*). In those cases the tender of treasury notes, made lawful money by the act of Congress, was held to satisfy a debt which had been contracted, before the passage of the act, to be paid in the then "lawful money of the United States." The general theory of these decisions, and of all the decisions of other courts upholding the power of Congress to create other lawful money than gold or silver coin, is, that by the omission in the Constitution of the United States to declare what shall or shall not be a legal tender, and the prohibition to the States to make anything besides gold and silver a legal tender, the power, by necessary implication, is conferred on the general government. Hence, at different periods, Congress has designated what should be legal tender. In 1792, they established a mint for coining gold and silver, which, by the same act, was made lawful money for the payment of all debts. In 1793, they made certain foreign coin a legal tender, and from time to time have regulated the value of foreign and domestic coin. These acts have never been questioned; yet the power to pass them is not expressly given to Congress by any provision in the Federal Constitution. Hence they can be sustained only upon an implication of power. Congress is not confined to the exercise of powers expressly granted. The Supreme Court of the United States, in *M'Culloch v. The State of Maryland*, 4 *Wheat.*, 316, and *Gibbons v. Ogden*, 9 *Id.*, 1, 188, wholly rejects any such limitation, and the Court of Appeals, in the cases cited (*supra*), follows these decisions.

The charter of the vessel in this case was made in January,

1863, nearly a year after the passage of the Legal Tender act, and the parties are presumed to have made their contract with reference to the existing law (*Dewitt v. Brisbane*, 16 *N. Y.*, 508). For purposes of construction and ascertaining the intention of parties, the place of performance is the place of the contract. It is therefore to be assumed that the parties were cognizant of the law of the United States making paper money a legal tender in payment of all debts, and were also cognizant of the interpretation of that law by our courts.

It was substantially conceded on the argument by the respondent's counsel that if a debt existed in this case it could be satisfied by an offer of legal tender notes. That, it appears to me, was conceding too much, as it is entirely clear a debt did exist. A charter party is but a contract for the entire or some principal part of a ship for the conveyance of goods on a determined voyage, or for employment in other trade, and contains covenants by each party. In the charter before us it was mutually agreed that the freight should be paid on unloading and delivery of the cargo. The lien which the owners had for their charter freight was a mere security, and it might have been waived; but the waiver would not have discharged the contract to pay freight. The right to collect freight by action has frequently been adjudged. In *Clarkson v. Edes*, 4 *Cow.*, 470, it was held that the owner might insist on his lien, or by action compel payment; and in *Barker v. Havens*, 17 *Johns.*, 234, an action to recover freight from the consignor was sustained after the goods had been delivered to the consignee without payment. And where freight is payable on delivery of the goods, the consignee by accepting the delivery renders himself personally liable for the freight (*Cook v. Taylor*, 13 *East*, 339). The obligation to pay freight is a debt, whether the obligation arises from an express or an implied agreement. Any agreement by which one party promises to pay money to another party is a debt. So also any agreement which expressly or impliedly imposes an obligation to pay money is a debt. The freight due from the defendants' consignors, and for which an action could have been maintained, was a debt which they could have satisfied by payment. The defendants, as consignees of the goods, were the mere factors of the consignors (*Story Ag.*, § 33). Payment by them would have discharged the debt of their principal. The argument of the respondent's counsel proceeds upon the ground

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that no debt existed as between the owners and consignees. He seemed to lose sight of the consignor's agreement to pay freight (which agreement created a debt), and also of the duty, as well as right, of the consignees to satisfy such debt of their principal by payment. And the question is not changed by the position of the parties on the record, especially under the stipulation in the case.

But the main question is, Can a contract to pay in silver or gold dollars be satisfied by payment in any other kind of money? Congress, by the Legal Tender act, has made a paper dollar the equivalent of a gold or silver dollar. Having the power to establish and regulate the value of coin, it has depreciated the value of gold and silver coin, for every purpose cognizable by courts, to the level of paper money, and has declared that one of its notes, representing the value of one hundred cents, shall be equal to a gold or silver dollar, representing the value of the same number of cents. The power is not confined to paper money. Any other substance might be made the medium of exchange and declared lawful money. The uncoined and unstamped bits of silver of the ancients, which were weighed out, and not counted, and the wampum of the Indians, were money. Money is the mere representative or supposed representative of definite value. The precious metals among all civilized nations are the usual accepted representatives. Gold and silver are standards of value which regulate, in a greater or less decree, all other values. Any other standard of value would do the same thing. A ton of coal or a barrel of flour, if made by law the standard of value, would regulate and adjust all other values, gold as well as merchandise. Gold and silver coin at their established value, for all legal purposes, do not change; they are never depreciated or appreciated. It is erroneous to say the market for gold fluctuates, except when it is trafficked in as a commodity. As coin or a medium of currency, its value as fixed by law does not change with the mutations of trade and commerce. All other things rise or fall in the fluctuations of business by comparison merely, Congress having created paper money, and rendered it nominally, for all legal purposes, equal to gold, there no longer remains, in legal contemplation, any difference between them. The practical or actual depreciation of the former below the value of gold is not produced by any law,

but is occasioned by the laws of trade, of supply and demand, and other causes for which the law is not accountable. Used in commerce with foreign countries, gold and silver are the only accepted mediums of exchange, and their value is attributable to their universal appreciation and currency among all nations. In domestic commerce, however, they lose some of their importance by the substitution of other standards of value, which are made their equivalent. As an article for traffic, gold, either in coin or bullion, is regulated by the same rules that govern other commodities. Contracts for its purchase or sale are valid, and are regarded like contracts for the purchase or sale of merchandise. There is a wide difference, however, between gold or silver as merchandise, and as money. A contract to buy or sell gold cannot be specifically enforced—an action for damages being entirely adequate; the rule of damages being in such a case, probably, the market value of the gold. As circulating mediums, gold and silver are not subjected to any of the rules or principles which regulate contracts. They are used only to purchase property, to discharge obligations and pay debts. A paper dollar having been made equal to a gold dollar, it must be accepted as such in satisfaction of any contract for the payment of money, and no form or force of words can be used by contracting parties to give to a gold dollar a legal value as money above a paper dollar. A dollar is one hundred cents, no more, no less, whether it is silver, gold or paper, and when Congress declares that a paper dollar shall be current, and pass for and represent, and be of the value of one hundred cents, for all purposes of traffic and paying debts, it becomes the equivalent of one hundred cents in any other substance or form.

It has been strongly urged that Congress, in declaring paper money a legal tender in payment of debts, has recognized and preserved a distinction between it and coin, and the exception in the statute, of duties on imports and interest on the public debt, is mainly relied on to establish such distinction. It is true that Congress has also, from time to time, authorized the issuing of bonds and notes, the interest and principal of which is expressly payable in coin (12 *U. S. Statutes at Large*, 345, § 5; 709, § 1; 13 *Id.*, 13). Such bonds and notes, however, were to become a part of the public debt of the country, and were accordingly brought within the great leading principle

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of the government, of paying in specie, which has existed at intervals for more than three-quarters of a century, having been originally enacted in 1789, re-enacted in 1840 and again in 1846. The exception, therefore, in the statute, of duties on imports, and interest on the public debt, as well as all subsequent legislation creating or prescribing the manner of payment of the public debt, are but re-enactments of the acts referred to, and especially of the act commonly denominated the Sub-Treasury act, passed by Congress in 1840 (5 *U. S. Statutes at Large*, 385) and the act of Congress in 1846, (9 *Id.*, 59). Those acts provided that all sums accruing or becoming payable to the United States for duties, taxes, sales of public lands or other debts, should be paid in gold and silver only, and that all payments by the United States should also be made in gold and silver coin only. It was not intended by the Legal Tender act of 1862, nor by any of the subsequent acts, to change the policy of the general government of paying in specie, and the exception, therefore, became necessary merely to preserve the provisions of former statutes. Since the passage of the act of August, 1846, payments to and by the general government have been made in coin only, or in notes issued under the authority of the United States and directed to be received by law. In thus following the long established practice of the government of paying in coin only, Congress has indicated nothing that could be construed into a design to create any legal difference between gold or silver and paper money, as a legal tender in payment of private debts. Indeed, the exception gives force to, and explains the meaning of, the previous parts of the sentence.

From the view which I have here expressed it follows, necessarily, it seems to me, that a contract which creates a debt, which debt can be paid with money, can be satisfied by any money which is a legal tender at the time the debt is to be paid, and can be satisfied in no other way. Indeed, I do not see how a contract can be framed by which a party to it could be compelled to pay money in silver or gold, when some other substance is made by law sufficient to satisfy the debt. Let us test it by an example. Suppose the plaintiffs had sued to recover the freight, would the judgment have been for so many dollars in silver and gold? Such a judgment could not be rendered. The recovery would be for so many dollars, and

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the judgment could be satisfied by the payment of the number of dollars, in any money which was a legal tender at the time. The defendants' consignors had agreed to pay a certain sum of money, and they had agreed that it should be paid in silver and gold dollars. Could the owners have required a specific performance of the contract? Certainly not. It was to pay money, not gold and silver dollars, and the sum of money only was recoverable. This rule is recognized and well settled when applied to contracts payable in chattels (*Pinney v. Gleason*, 5 *Wend.*, 393; *Rockwell v. Rockwell*, 4 *Hill*, 164).

I know it is said that the practicable or marketable difference in value of paper money and coin must be presumed to have been within the contemplation of parties engaging to pay in coin, and that, therefore, such difference should be recoverable as damages, and such seems to have been the view taken by the referee in this case. It is also supposed that upon a contract to pay a sum of money in gold, a recovery may be had for the value of gold, as ascertained by comparison with paper money. But the difficulty with the suggestion is, that it does not recognize or admit the distinction which exists between gold as a commodity of traffic, and gold used as money. A contract to deliver one thousand dollars of gold is a very different contract from one to pay such sum in gold. The former can be specifically enforced, and the other can be satisfied by gold or its equivalent. Money, being the common measure of all things, has not, like other things, any particular function. It takes the place of all other things, but is represented only by standards created by law. Gold in bars is no more "money" than are pigs of iron, lead or copper. Like them it may be bought and sold by weight; but until it is "coined" and the value of the coin is ascertained and declared by law, it is no more a medium of exchange or currency than any other metal would be.

I am unacquainted with any other rule of damages for the non-payment of money, other than the legal rate of interest upon it. At common law not even interest was recoverable, either as an incident to the debt or otherwise; but statutes and adjudications have relaxed the common law, and it is now allowed as damages (*Sedg. on Damages*, 234). "Interest," says *DOMAT*, liv. iii., tit. v., sec. 1, "is the name applied to the compensation which the law gives to the creditor who is entitled to recover a sum of money from the debtor in default." The loss

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experienced by those who are not paid at maturity is as diversified as the use they might make of the money, and as unforeseen as the wants from which the injury might arise. But no such loss is recoverable. The damages are limited to the infliction of interest merely. The recovery of the current rate of exchange, besides interest, upon a debt contracted in Great Britain, was refused in *Martin v. Franklin* (4 *Johns.*, 124), and in *Seofield v. Day* (20 *Id.*, 102), and I do not think a case can be found which sustains any measure of damage for the non-performance of a contract to pay money, other than interest upon the sum in default. To adopt any other measure would destroy the efficacy of the Legal Tender act, and limit its effect by admitting factitious value to regulate the damages.

The plaintiff's view cannot, therefore, in my judgment, be sustained, upon any principle applicable to the recovery of the difference in value between paper and gold money as damages; nor upon any principle applicable to the specific performance of contracts; and no other principle has been suggested upon which it can be sustained. The contract in this case was to pay a sum of money which decame a debt. The offer of money which had been made a legal tender in payment of all debts, was sufficient to discharge the obligation; and the agreement to pay in silver and gold dollars had no greater effect than if it had been to pay in the "lawful money of the country."

But the question is not new nor without authority. The cases in the Court of Appeals, before referred to, substantially determine the question. The moment the validity of the act is assumed, the consequences flowing from it are apparent. Judge DAVIES says (page 459), "it is the lawful money of the United States, made such by authority, that can only be effectually used in the payment of debts, without reference to the intrinsic value of the thing tendered or paid." We were referred on the argument to decisions made in some of the States of the Union entertaining views apparently opposed to those I have here expressed. As we have been furnished with only newspaper reports of these cases, we cannot be certain of the precise questions raised and decided. The case of *Mervin v. Sailor*, in the District Court of Pennsylvania, held that a quit rent payable in "lawful silver money" could not be extinguished by the payment of a sum in gross in legal tender notes. But the decision was solely upon the ground that the quit rent was not a debt,

and, therefore, not within the provisions of the Legal Tender act. The right to satisfy a debt with legal tender money is fully recognized. The rent in that case was payable in "silver weighing seventeen pennyweights and six grains," and the learned Justice HARE says, that neither could the payment of such rent be specifically enforced, nor could the difference in value between the silver and legal tender money be recovered, as damages. Two *nisi prius* cases in the Supreme Court of this district were also referred to (*Chapin v. Pretzfelder*, *Prouty v. Potter*), and one case at special term in this State (*Luling v. Atlantic Mutual Insurance Co.*, 30 *How. Pr.*, 69). The first two cases do not seem to have been much considered, and the report of them is too meagre to enable us to see what was intended to be decided; and the last case was a proceeding in equity to require the payment of dividends in gold. There is nothing, therefore, in any of these cases, beyond a mere *dictum* in two of them, which is hostile to the views we have here taken. On the other hand, we were referred to numerous decisions in the State courts, extracted from newspapers, sustaining our position. The only one which has got into the books is *Warnibold v. Shlieting* (16 *Iowa*, 243), in which the Supreme Court of that State held that a promissory note payable in "United States gold" was satisfied by a tender of legal tender notes. The opinion of the Chief Justice is able, and his reasoning, to my mind, conclusive.

My conclusion is that the charter party requiring the freight to be paid in silver and gold dollars, could be satisfied by payment in legal tender notes, and that a tender of the freight in such notes discharged the debt. The referee should, therefore, have held the tender sufficient, and it was error to award judgment for the plaintiffs.

The judgment must be set aside and a new trial ordered, with costs of the appellants to abide the event.

GARVIN and JONES, JJ., concurred.

THE PEOPLE *against* BRENNAN.

Supreme Court, First District; Special Term, November, 1865.

MANDAMUS.—PAYMENT OF SALARIES PENDING CONTEST AS TO
TITLE TO OFFICE.

In an action to try the title to an office, the Supreme Court at special and general terms, having decided in favor of one party;—*Held*, that the fiscal officer of the municipal corporation was authorized in paying to the deputy of such party the moneys provided by law for the salary of such deputy.

Upon the Court of last resort reversing such decision and declaring the adverse party to be entitled, a mandamus will not lie at the suit of the deputy of the latter to compel payment, again, of the salary for the same period, to him, in the absence of any appropriation for the purpose.

Application for a mandamus.

Pending the controversy for the office of Tax Commissioners for the City and County of New York, which is fully reported in *People v. Woodruff*, 32 *N. Y.*, 355, the Comptroller of the city, Brennan, paid the salary of the incumbents' deputy; and the adverse claimants having finally prevailed, Morgan, their deputy, the relator in the present proceeding, moved for a mandamus to compel payment of his salary.

C. Trull, for the defendant, objected that the relator had not actually performed the duty of a deputy, and that the claim had not been audited and there were no funds in the treasury applicable to it, citing, as to the last point, § 5 of the act of 1857, relative to the Board of Supervisors of New York, which prohibits the drawing of money from the treasury for any purpose unless it has been previously appropriated thereto by law.

I. T. Williams and *Mr. Smyth*, for the relator, as to the first objection cited and commented on *People v. Tieman*, 8 *Abb.*, 350.

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As to the second objection counsel urged that audit was unnecessary, because the amount of the claim, alleged in the writ, was admitted in the return, by omitting to deny it, and only setting forth reasons why it should not be paid; moreover, that this claim was not an "account" within the statute, nor was it against the city; and that the relator's only remedy was by mandamus.

As to the objection on the ground of want of funds, he cited and commented on the act of 1859, § 3; *The Queen v. The Trustees, &c.*, 1 *Q. B.*, 860; see also 1 *Gale & D.*, 248; *Tapping on Mand.*, 60 *Law Library*, 359; *Queen v. Eastern Counties Railway*, 10 *Ad. & El.*, 531.

CLERKE, J.—I think that the defendant was justified in paying the salary, now demanded by the relator, to the actual incumbent of the office, during the period in question. The Special and General Terms of this Court decided that the Commissioners who appointed him, were themselves legally appointed. Before this decision was reversed by the Court of Appeals, and while it was operative as the law, and, consequently, binding upon him, the defendant paid to the incumbent the money which had been appropriated, and which was then in the treasury, for such payment. If he was justified in doing this, he cannot now be compelled to pay the relator out of the public money under his control. There is no appropriation for such payment; and, consequently, there is no money in the treasury for this specific purpose. It would be a violation of law for the Comptroller to take money appropriated for some other purpose, and apply it to this. I cannot direct, much less compel him to do what would amount to an infringement of his duty and of the law. Whatever other remedies the relator may have, if he has any, this application cannot, in my opinion, be granted.

Motion for a mandamus denied

ROBINSON *against* THE CORN EXCHANGE, &c.
INSURANCE COMPANY.*New York Superior Court; General Term, May, 1863.*INSURANCE.—DENIAL IN PLEADING.—INTEREST.—MEASURE OF
DAMAGES.

Where insurers, having insured one who has a special property in goods, for account of whom it may concern, after a loss and abandonment intervene and recover a part of the goods, as they have a right to do, and receive the proceeds, without knowing the owner, the latter cannot, in an action against them for money had and received, recover interest thereon for the time elapsing before they had any notice of his claim.

An allegation in the complaint that the defendants sold the plaintiffs' property for a certain sum, and that they "have had the use of, and interest upon, said money since it was received as aforesaid by the defendants for the plaintiffs' use," is sufficiently controverted by a denial in defendants' answer that they sold the plaintiffs' property, or that they received therefore any money whatever to the plaintiffs' use.

The right to interest in such a case is a question of law, not of fact. It is only in the class of cases where interest may be charged against a defendant as damages, that he has a right to have the jury pass upon the question.

In such action the necessary expenses of the defendants, paid in recovering and selling the goods insured, are to be allowed to the defendants, to be deducted from the proceeds.

Appeal by the plaintiffs from a judgment entered in their favor, on a verdict rendered by the jury pursuant to the direction of the court, on the trial of the cause.

The plaintiffs, Shadrack Robinson and Charles H. Cummings, sued for money had and received by the defendants to their use, alleging in the complaint that in 1854 the defendants sold a quantity of corn belonging to the plaintiffs, on account of the plaintiffs, and that the defendants received for it, in or about the

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months of October and November, 1854, for the use of the said plaintiffs, and for them, two thousand three hundred and twenty-six dollars and thirty-seven cents. That the plaintiffs have often requested the defendant to pay them, the plaintiffs, the said money thus received by the defendants, but the defendants have neglected and refused, and still neglect and refuse to do so, and that the said defendants have had the use of, and interest upon, said money since it was received as aforesaid by said defendants, for the plaintiffs' use.

Judgment was demanded for the sum, with interest, from November, 1854.

The cause was tried on the 18th day of June, 1861, before Chief Justice BOSWORTH and a jury.

The facts proved were as follows:

In September, 1854, the plaintiffs, by their agent, shipped a quantity of corn at the city of Buffalo, on board of tow boats owned by Edmund Savage, consigned to N. H. Wolf & Co. in the city of New York. Savage effected an insurance on the corn in the defendants' company. At Albany the corn was trans-shipped on board the barge Hudson, which, on its passage to New York, became disabled, and partly sunk. The defendants intervened to save the corn from total loss, and got up a portion of it, which they sold at auction for the gross sum of two thousand three hundred and twenty-six dollars and thirty-seven cents. The expense of raising the barge to get at the corn, the freight from Castleton, where she sunk, to New York, and the charges for taking out and selling the corn, amounted to seven hundred and sixty-nine dollars and fifty-five cents, leaving in the defendants' hands as net proceeds, the sum of one thousand five hundred and fifty-six dollars and eighty-two cents.

This was proved by a stipulation entered into between the parties, which stated that the defendants, in saving the corn, paid certain sums specified for that purpose, but nothing was said in the stipulation, nor was there any other evidence as to these expenditures being reasonable or necessary.

Edmund Savage commenced a suit against the defendants on his policy of insurance in 1855. In the complaint in that suit, Savage claimed to recover for a total loss; but there was no count in the complaint claiming the proceeds of the corn. That

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action was tried in April, 1861, and Savage recovered the value of the corn, less the amount received by the defendants for the sale of the corn.

On the 13th of March, 1860, the plaintiffs demanded of the defendants payment of the sum received by them on the sale of the corn, which was refused.

Upon the trial of the present action, the Chief Justice instructed the jury that the plaintiffs can only recover the net proceeds of the corn; and interest only from the 13th of March, 1860, the date of their demand; and he directed them to find a verdict accordingly for the plaintiffs.

The plaintiffs' counsel excepted to the charge of the judge, and the jury found a verdict for the plaintiffs for one thousand six hundred and ninety-four dollars and fifty-six cents, for which judgment was entered. The plaintiffs appealed.

James Crombie, for the plaintiffs appellants.—I. The plaintiffs were entitled to recover interest upon the net proceeds of the corn from the time the defendants received them. 1. Because the defendants had used the money, and had received the interest upon it, as is admitted in the pleadings. When a person uses another's money, or derives interest therefrom, he is as much bound to pay interest thereon as he is the principal (1 *Am. Lead. Cas.*, 358, and cases cited; *Dodge v. Perkins*, 9 *Pick.*, 369; *Miller v. Bank of Orleans*, 5 *Whar.*, 503). 2. As matter of law upon the facts, the plaintiffs were entitled to recover interest upon the net proceeds. (a.) Because the defendants sold the corn without their consent, and therefore without any right or authority to do so (2 *Phil. Ins.*, 333, 335, and cases cited; 1 *Am. Lead. Cas.*, 360, and cases cited; *Greenley v. Hopkins*, 10 *Wend.*, 96; *Chauncey v. Yeaton*, 1 *N. H.*, 151; *American Ins. Co. v. Center*, 4 *Wend.*, 52; *Bryant v. Commonwealth Ins. Co.*, 13 *Pick.*, 553; *Parson's Merc. Law*, 380). b. Because the defendants ought in good faith to have paid over the money received by them, as soon as it was received, without any demand therefor (*Stacy et al. v. Graham*, 14 *N. Y.* [4 *Kern.*], 492; *Lynch v. De Viar*, 3 *Johns. Cas.*, 303; *Pease v. Barber*, 3 *Caines*, 266; *Van Rensselaer v. Jewett*, 5 *Den.*, 135; 2 *N. Y.* [2 *Comst.*], 135; *Mason v. Waite*, 17 *Mass.*, 560; 1 *Dall.*, 313, 316; 1 *Am. L. Cas.*, 341, 345. The pendency of the suit

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of Edward Savage upon the policy was no excuse for the non-payment of the money, as he did not own the corn, and could not recover the money received for it.

II. If the Court overruled the first point, then we submit that the judge erred in not submitting the question of interest to the jury (*Stacy v. Graham*, 14 *N. Y.* [4 *Kern.*], 492 ; 1 *Am. L. Cas.*, 352 ; *Van Rensselaer v. Jewett*, 5 *Den.*, 135 ; 1 *Johns.*, 315 ; *Watkinson v. Laughton*, 8 *Johns.*, 213 ; *Richmond v. Bronson*, 5 *Den.*, 55).

III. The plaintiffs were entitled to recover from the defendants the gross amount received by them for the corn.

The defendants had no right to sell the plaintiffs' corn without consulting them, under the circumstances detailed in the case. In order to excuse a sale, they should have made out a case of absolute necessity, in order to save the corn from destruction. No such necessity existed here. It appears from one of the items of expense, that they took a portion of the corn to New York. If they had time to do this, they could have notified the plaintiffs (2 *Phill. on Ins.*, 333, 335, and cases there cited).

IV. At any rate, the question of the necessity and reasonableness of the defendants' charges for expenses should have been left to the jury.

T. C. T. Buckley, for defendants, respondents.—I. The ruling of the judge, at the trial, on the subject of interest, was correct (*Van Rensselaer v. Jewett*, 2 *Coms.*, 140 ; *Sedgw. on Damages*, *Ed.* 1858, 379 ; *Phelps v. Bostwick*, 22 *Barb.*, 318 ; *Williams v. Storrs*, 6 *Johns. Ch.*, 358 ; *Harrington v. Hoggart*, 1 *Barn. & Adol.*, 577, 574). There was no proper demand prior to March 13th, 1860. The order from Savage, if complied with, would have been no bar to plaintiffs' claim, as he was not their agent, and had no right to transfer the property in the corn.

II. There is no admission or proof that defendants have employed the money in question, or derived any profit from its use. But the defendants, being mere stakeholders, would not be liable for interest, even if they used the money (*Jones v. Mallory*, 22 *Conn.*, 392).

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III. In no aspect of the case are defendants liable for the gross proceeds of the corn.

By THE COURT.*—MONELL, J.—The only exceptions argued upon this appeal were to the charge of the judge, restricting the recovery to the net proceeds, and interest from the time the demand was made, and directing a verdict for such amount. The action for money had and received, is an equitable action, and the party must show he has equity on his side. The rule in England is, that interest is not recoverable in this action (*Walker v. Constable*, 1 *Bos. & Pull.*, 307), but it is otherwise in this country (*Pease v. Barber*, 3 *Caines*, 266; *People v. Gasherie*, 9 *Johns. R.*, 71; *Gillet v. Van Rensselaer*, 15 *N. Y. R.*, 397). In this State interest is allowable where the circumstances of the case show that the plaintiff is equitably entitled to it.

The corn was rescued from total loss in *October*, 1854, and the proceeds of the sale were received by the defendants in *November*, 1854. The insurance was effected by, and in the name of Edmund Savage, who sued the defendants upon the policy to recover as for a total loss. There does not appear to be any evidence in the case that, at any time previous to the demand of the 13th of *March*, 1860, the defendants knew or had any reason to suppose the plaintiffs owned or had any interest whatever in the corn. We asked the plaintiffs' counsel in vain to point us to any testimony, showing or tending to show such knowledge, or anything which was calculated to even put the defendants upon inquiry. We are therefore to assume, that the defendants were at all times ignorant of the right of the plaintiffs to the proceeds of the corn, until they demanded payment therefor. Indeed, until the determination of the suit upon the policy, in which Savage sought to recover as for a total loss of all the corn, no action would lie against the defendants for the proceeds of the corn sold, either by Savage, or the plaintiffs. Savage was liable to the plaintiffs, as the carrier of the corn, and a recovery upon the policy by him as for a total loss would, indisputably, have entitled the defendants to retain, as their own, the proceeds of the

* Present, BARBOUR and MONELL, JJ.

corn sold. Until the extent of the defendants' liability was fixed by the judgment in the suit of Savage against them, the plaintiffs could not call on the defendants for payment. This last action did not terminate until April 11th, 1861, when the jury, under the direction of the court, deducted from their verdict the net proceeds of the corn sold by the defendants.

It is at least questionable whether any recovery could be had in this action, for principal or interest, until the termination of the other suit in April, 1861.

There is nothing in the circumstances of this case, which upon the principle of *ex æquo et bono*, required the defendants to pay the money to the plaintiffs, or to any other party, until their right to retain it was determined in the other suit. And even if this were not so, and the defendants were mere depositors of the money, they could not in conscience be called upon to pay either principal or interest until it was demanded of them. In that view they were mere trustees or bailors, who are never, except under special contract, chargeable with interest (*Utica Bank v. Van Gieson*, 18 *Johns. R.*, 485).

I am therefore of the opinion that the charge of the judge, if anything, was too favorable to the plaintiffs; but, as the defendants have not appealed, the judgment cannot be disturbed for that reason, and the plaintiffs cannot object.

There is no force in the argument that by the pleadings the defendants admitted that they had had the use of the money, and of the interest upon it since they received it. The denial in the defendant's answer, that they sold the plaintiff's corn, or that they received therefor any money whatever to the plaintiffs' use, is a sufficient denial that they had the use of the money or of the interest upon it.

The denial of the substantive cause of action is enough to controvert all the mere incidents to it. Besides, the allegation in the complaint is equivocal, and would be true, if the defendants had had the use of the money for one day and no more before suit brought.

In rescuing the corn, and making sale thereof, the defendants paid from the gross proceeds necessary expenses, which they were allowed to retain under the ruling of the court. That the defendants had a right to intervene to save the cargo from total loss is not disputed; and even if they had no right to sell with-

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out giving notice to the plaintiffs, there is nothing to show that they had any knowledge of the plaintiffs whatever. As the action is an equitable one, for money received to the use of the plaintiffs, there is no principle in law or morals which should make the defendants liable for any more than they actually received. Therefore, the necessary expenses paid in raising and selling the corn, were properly allowed to be retained by the defendants.

The right to recover interest in a case of this kind, is a question of law, and not of fact, and the judge properly refused to submit it to the jury. Interest is the incident to a debt, and the law fixes the time when it begins to accrue. It is only in the class of cases where interest may be charged against a defendant as damages, that the jury has a right to pass upon the question (*Richmond v. Bronson*, 5 *Denio*, 55).

Had there been any evidence impeaching the reasonableness of the expenses incurred in rescuing and selling the corn, it would probably have been error to have taken that question from the jury. But there is no such evidence; and had the jury, upon the question being submitted to them, found, under the evidence, that the expenses were unreasonable, the court would have set the verdict aside, as contrary to the evidence.

There was, therefore, nothing in the case upon which it was necessary for the jury to deliberate; consequently, there was no error in directing a verdict for the plaintiff.

The judgment should be affirmed.

affirmed
31 Oct. 140
35 N.Y. 125

THE PEOPLE *against* FERRIS.

*Supreme Court, First District; General Term, November,
1865.*

CRIMINAL LAW.—CHALLENGE TO THE ARRAY.—EXPRESSION OF
OPINION BY THE SHERIFF.—VENIRE.—DIRECTORY
STATUTE.—DRAWING JURORS.—NEW
TRIAL.—SECOND INDICTMENT.

The expression of an opinion by the sheriff, as to the guilt or innocence of the prisoner, is not sufficient cause of challenge to the array, unless he does some act, or omits some duty, by reason of which a juror called upon to try the case is disqualified.

The judge has power to excuse jurors without cause, who have been empannelled for a term.

Under the Revised Statutes, no venire is necessary in criminal cases.

The statute as to the mode in which jurors are to be drawn is directory; and a neglect to conform to its provisions is not, in itself, a sufficient ground for setting aside a verdict where the prisoner has not been prejudiced.*

Even after the arraignment of the prisoner, and plea, and part of the jury called, the court have power to postpone the cause, and such commencement of a trial cannot be pleaded in bar of a second indictment for the same offence.

An order for the continuance of the term of the Court of Sessions beyond the third week need not be incorporated in the record of judgment on a conviction had during such continuance.

Writ of error to the Court of General Sessions of the city and county of New York.

* It is a good ground of challenge to the array, that certain of the jurors had not been summoned by any legal authority, and that their names had been put upon the list of jurors by the clerk of the court at their request, without any order having been entered requiring such jurors to serve (*McCloskey v. People*, 5 *Park. Cr.*, 308).

In empannelling a jury for the trial of a felony at the Oyer and Terminer in the county of Kings, it is not erroneous for the court, after failing to get a jury from the thirty-six jurors summoned for the first six days of the court, under the act of April 17, 1858, applicable to that county, to refuse to summon talesman, and to proceed to complete the jury from the thirty-six jurors summoned for the next six days of the court (*Lambertson v. People*, 5 *Park. Cr.*, 200).

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The plaintiff in error, Frank Ferris, was indicted in the court below in February, 1865, for the murder of his wife, Mary Ferris, on the 9th day of September, 1864. At the term of the court held on the 28th of February, 1865, the plaintiff in error was brought to trial upon the indictment, and was convicted of murder in the first degree, and judgment of death pronounced upon him, to be executed on the 14th day of April, 1865. Upon that judgment, the present writ of error was brought.

J. H. Anthon and *William F. Kintzing, Jr.*, for the plaintiff in error.

A. Oakey Hall, for the people.

BY THE COURT.—LEONARD, J.—Ferris was indicted, tried and convicted of murder in the first degree, at the Court of General Sessions in this city.

The case was tried on the 27th and 28th of February, 1865, after the close of the third week of the February term.

As it appears from the return of the clerk, an extra panel of one thousand jurors was drawn on the 7th day of February, 1865, in the presence of certain officers, required by law to attend, who were duly notified for that purpose, and, as it also appears from the return of the sheriff, these jurors were all duly summoned. No question is made but that these were the proper officers to attend and certify the drawing of jurors.

The counsel for the prisoner challenged the array of jurors, specifying in writing nine separate grounds of objection. In the challenge is incorporated the returns and certificates of these different officers, and it is therein stated that the panel of jurors was filed on the 13th of February, being the same panel then in court, wherefrom the jury to try the said indictment were to be selected.

The first ground of challenge alleges that the sheriff who summoned the jurors had formed and expressed an opinion as to the guilt or innocence of the prisoner.

The next seven grounds allege a want of compliance with the statutes in respect to the drawing of the jurors, viz.: the proper officers did not actually attend; some of them signed blank certificates which the clerk filled up after the drawing; no minutes of the drawing were kept; no copy of the minutes was delivered to the sheriff. The sheriff summoned the jury without any copy

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of the minutes being furnished to him ; the ballots drawn from the jury box were delivered to him, from which he summoned the jurors ; and that the panel or list filed is not a copy of the minutes of the drawing.

The other ground of challenge is that the recorder, who held the court at which the prisoner was tried, excused and excluded seven hundred and sixty-four of the jurors from attendance, without reasonable cause shown.

There was no charge of any fraud or corruption against any of the officers who drew or summoned the jurors or certified the list ; nor of any injury or prejudice to the prisoner.

The district attorney demurred to the challenge ; admitted the facts as alleged, and insisted that none of the objections were well taken.

The recorder sustained the demurrer. The defendant then interposed a special plea that before the finding of the indictment upon which he was then arraigned, another indictment for the same offence had been found against him, which was still in full vigor, to which he had pleaded not guilty, and the issue so joined had been brought on for trial in the same court ; that the prisoner had there challenged the array of the jurors, which had been overruled ; that one juror had been drawn whom the prisoner had challenged ; that he afterwards withdrew his challenge, and consented that the juror might be sworn in chief ; that, in opposition to the wishes of the prisoner, the People refused to further prosecute that indictment, and the trial was then postponed, notwithstanding his objection. A demurrer to this plea was put in by the People, and the prisoner joined issue thereon. The court sustained the demurrer, and gave judgment for the People. By leave of the court, the prisoner pleaded not guilty to the charge contained in the indictment. A jury was then impaneled from the array aforesaid, and the trial proceeded, which resulted in the conviction of the prisoner.

1. The challenge to the array on account of the expression of an opinion by the sheriff who summoned the jury, in respect to the guilt or innocence of the prisoner, is novel in its character, and no direct precedent or decided case has been cited in support of the objection. The statute limiting challenges to the array, so as to exclude any objection based upon the interest in the cause or relation of the sheriff to either party therein, has

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been urged on behalf of the people, as one answer to the challenge.

This answer is not sufficient. The formation or expression of an opinion by the sheriff as to the guilt or innocence of the prisoner, cannot be considered an interest in the cause, in a criminal case (2 *Rev. Stat.*, 420).

The interest referred to in the statute is of a pecuniary nature.

The formation or expression of an opinion by the sheriff has no relation, by itself, to the duty which the jurors have to perform in respect to the trial. I am unable to perceive how the opinion of the sheriff injures the prisoner, unless it be alleged that he does some act, or omits some duty, by reason of which a juror who has formed or expressed an opinion in relation to the case he is called on to try would be clearly disqualified, without reference to the fact whether it was favorable or unfavorable to the prisoner—such a juror would not be indifferent. It is quite different in respect to the sheriff. In my opinion it was necessary for some other fact to be alleged in the challenges to render the charge material, as that the sheriff had intentionally omitted to summon a juror; or had *stated his opinion to some juror*; the mere fact that the sheriff has formed or expressed an opinion, seems to be wholly immaterial. The same considerations also apply to all the other objections. The jurors were fairly drawn from the box, so far as we know; indeed, we must assume that it is so, since no allegation to the contrary is contained in the written challenge. The same persons were drawn and summoned that would have been had the proper officers attended and witnessed the drawing, as required by law.

Although it was highly improper, perhaps even a misdemeanor, in the case of those public officers who signed certificates in blank, yet it is not claimed that the smallest abuse of the confidence reposed by them in the clerk took place, or that any change was produced in the result which would otherwise have been obtained.

With the exception of the charge of signing the certificate in blank, to be afterwards filled up when the drawing should be completed, none of the objections to the manner of drawing the list of jurors, can be considered anything more than trifling irregularities. These questions, including that of signing the certificate in blank, were not such as can be raised by the prisoner.

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They are between the People and the officers. The statute directs how duties of the officers who draw and summon jurors shall be performed ; and although it provides that it shall not be done in any other way, it is not of any materiality to the prisoner, unless some change results in the names that would otherwise have been drawn or summoned as jurors.

So in respect to the ground of challenge arising from the discharge of the larger part of the jurors—more than the usual number still remained in court—the jurors are presumed to be equally well qualified. The prisoner does not allege that he was deprived of an opportunity to select twelve men who were wholly indifferent between himself and the People, good and lawful men. The act was within the proper discretion of the recorder—none of these grounds of challenges were sufficient.

2. It was also said by the learned counsel for the prisoner that no venire had issued. This was not made a ground of challenge to the array, but it is urged because it is not stated in the record of conviction that such a precept was issued and returned.

The want of a venire, it is true, has been formerly held fatal to a conviction on a *motion in arrest of judgment* (18 *Johns.*, 212, *The People v. McKay* ; 16 *Johns.*, 146, *Cooper v. Bissell*).

The same doctrine was sustained in the case of *People v. McGuire* (2 *Park. Cr.*, 148), on writ of error and the allegation of diminution. The venire was also necessary at common law (*Chitt. Cr. L.*, 585). The venire has, however, been expressly abolished in civil cases, and the manner of summoning jurors in criminal cases is the same as that prescribed by law in civil cases (1 *Rev. Stat.*, 411, 414, and 734, § 2).

The statute, as to drawing and empanneling jurors, is directory to the clerk, and a neglect to conform to its provisions will not, *per se*, be a sufficient ground for setting aside the verdict, where the court see that the prisoner has not been prejudiced (*Wakeman v. Sprague*, 7 *Cow.*, 164 ; *People v. Ransom*, 7 *Wend.*, 427).

In the case of the *People v. Ransom*, SUTHERLAND, J., says, after referring to the cases of *Cooper v. Bissell*, and *The People v. McKay* (*supra*), “The error complained of appears on the face of the record ; and when that is the case it is always fatal.” If no injustice has been done, the court will not inter-

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fere, even on motion (12 *East*, 229, 231, *see note*, *King v. Hurst*, 4 *B. & Ald.* 430).

BEST, J., says, in the latter case. "The rule is this;—if the officer has not done his duty he is to be punished for it; and if his omission has actually produced prejudice to the party, then it is in the discretion of the court to prevent injustice being done by granting a new trial; the omission is not shown to have been prejudicial to the defendant;"—and the new trial was refused.

The provision of the Revised Statutes, requiring the district attorney to issue a precept (2 *Rev. Stat.*, 206, §§ 37–38), is directory, and the omission of it has no relation to the rights of the prisoner. Although this precept is to be directed to the sheriff, and is required to command the sheriff, among other things, to summon the grand and petit jurors who have been drawn (sec. 38), it is not strictly a venire, nor is it the authority by which the sheriff summons the jurors. The authority of the sheriff for this purpose, and the proceedings to be taken, are provided by the Revised Statutes (414). The jurors are to be drawn by the clerk; a certified list of the names is to be delivered to the sheriff, and he is required to summon those named in the list, and make his return thereon to the court.

This appears to supersede and in effect abolishes the venire. This subject is well examined in the cases of John Cummings (3 *Park. Cr.*, 343), and Francis McCann (*Id.*, 298); and although the latter case was afterwards reversed in the Court of Appeals, it was upon an entirely different question (16 *N. Y.*, 58). The objection before us relates, also, only to the form of the record of judgment, and is not raised by any exception, motion or objection, prior to the bringing of this writ of error; we are required to assume that there was no precept or venire, because none appears on the record. Were this objection to prevail, it would be in disregard of the provisions of the Revised Statutes, declaring that no trial, judgment or other proceedings on an indictment shall be affected by reason of any defect or imperfection in matters of form, which shall not tend to the prejudice of the defendants (2 *Rev. Stat.*, 287, § 52).

The jurors in this case were an extra panel, who are drawn and summoned in the city and county of New York under a statute specially applicable to that city, and are in the place

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of talesmen authorized in other counties of the State (*Davies' Laws*, 942, § 4). All jurors in the courts of record for the different courts of the said city, civil and criminal, are drawn and summoned in the manner provided in that act, including regular as well as extra panels. In view of these considerations, the case here is very different from that of McGuire (2 *Park. Cr.*, 148), referred to above, and we are not now called upon to dissent from the authority of that case.

The objection in respect to the venire is not well taken.

3. The answer to the objection raised by the special plea of the prisoner, that there is a former indictment against him for the same offence, upon which he was arraigned, and pleaded not guilty, and a commencement was made towards a trial by calling the name of one juror, which trial was then suspended against the consent of the prisoner, is that he was never put in jeopardy under the former indictment. It was still in the discretion of the court to postpone the trial, as if it had not been commenced at all. There was no trial, conviction or acquittal—nothing that can be pleaded as a bar. Counsel for the prisoner has cited no authority to maintain his special plea, and I think none can be found.

4. The rule laid down by the Recorder, in his charge, upon the subject of insanity, is precisely that to be found in the authorities (*People v. Freeman*, 4 *Den.*, 9; 2 *Green. Ev.*, § 373. *Vide* Opinion of Ch. Justice SHAW in the case of Abner Rodgers, to be found in the note, section 373).

5. The act of 1862 (*Laws* of 1862, p. 19), affords an answer to the objection that the trial was had after the close of the third week of the term. No objection was raised at the trial on this ground; and it has been raised here solely on the ground that no order for the continuance of the term appears on the record of judgment. The omission to incorporate it in the record does not show that the order was not duly entered on the minutes of the court. Every intendment is in favor of the regularity of the proceedings. It is not necessary to be included in the record.

The judgment should be affirmed.

INGRAHAM, P. J.—I think there can be no doubt but that most of the regularities relied upon by the prisoner, as grounds for challenging the array, can only be considered as matters for

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which the officer neglecting the performance may be punished, but not as being available to the prisoner, unless he can show some prejudice to himself, arising therefrom.

And I concur in the views expressed by Judge LEONARD in reference thereto.

That the conduct of the officer who drew the petit jury was wrong, and deserving of censure, at least, if not of punishment, must be conceded; but where the irregularities produce no harm to the prisoner, and do not appear on the record, they afford no ground for a new trial.

The greatest difficulty arises from the provisions of the statute, which says, that when the officers appear, and *not otherwise*, the clerk shall proceed to draw, etc., giving no power to the clerk to draw at any other time. With such an express provision, denying any right on the part of the clerk to proceed in the absence of the other officers, it may be a matter of doubt whether the provision is not to be considered more than directory.

A very slight degree of evidence to show that the prisoner might have been injured or prejudiced by it, would undoubtedly entitle the prisoner to a new trial. I am inclined, however, in the absence of any such proof, and knowing that the case can be heard in the Court of Appeals, at the next term of the court, to concur with Judge LEONARD in his conclusions, that none of these irregularities are sufficient to call for a new trial.

THE PEOPLE, *on relation of* LIVINGSTON, *against*
TAYLOR.

Supreme Court, First District; General Term, November, 1865.

JUDICIAL ACT.—MANDAMUS.—COMMISSIONER OF JURORS.

A mandamus will lie to the commissioner of jurors, to compel him to strike off from the list of jurors the name of a person who is entitled, under the statute, to have his name stricken off.

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The act of the commissioner of jurors, in determining upon the sufficiency of the excuse relied on by such an applicant, is not a judicial act within the rule relating to mandamus. The statute clearly defining his duty, he has no discretion to exercise, when the truth of the facts relied on is clearly shown to him.

Mandamus is not to be denied merely because the relator may have a remedy by action for damages.

Appeal from an order.

Robert J. Livingston, the relator, applied to the defendant Douglas Taylor, the commissioner of jurors for the city and county of New York, to have his name struck off from the list of jurors for 1864, upon the ground that he was a non-resident. The defendant having refused to do so, the relator applied at special term for a mandamus commanding the defendant to strike the name of the relator from the list.

The writ was granted by default, but subsequently the default was opened, and the judge decided that he had no power to issue the writ in such a case. The relator now appealed.

Lewis L. Delafeld, for the appellant.—I. Proceedings in mandamus cases are to be reviewed by appeal, and not by writ of error (*The People, &c. v. Church*, 20 *N. Y. R.*, 529; *People, &c. v. Albright*, 14 *Abb. Pr.*, 305; *Laws* 1854, p. 592.

II. The order is appealable. It was based solely upon the idea that the court has no right to direct the commissioner to strike off the relator's name, as directed by the writ. It has been repeatedly held that when a court refuses to exercise a discretion vested in it by law, under the impression that it does not possess the power which it is called upon to exercise, and in consequence an erroneous decision is obtained, such decision will be reversed on appeal (*Beach v. Chamberlain*, 3 *Wend.*, 366; *McElwain v. Corning*, 12 *Abb. Pr.*, 16; *McMahon v. Mutual, &c. Ins. Co.*, 12 *Id.*, 28; *Artisans' Bank v. Treadwell*, 34 *Barb.*, 553).

III. The only question is, has the court the power to compel the commissioner to strike a name from his list which he has erroneously placed there? Has it any control over him; or is he, as the opinion of the judge below would indicate, the only officer known to our law, who is beyond the reach of the law?

The relator presses the following views upon the court with the greatest earnestness, because if any other views should

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prevail, the commissioner would be clothed with arbitrary power, and could put any person of any age or sex upon his list, and there would be no adequate redress.

There can be no question as to the duty of the commissioner to strike off of his list the name of an exempt at any time. It is his duty to make and "correct" the list. The statute provides that "the names of all persons found to be exempt from serving as jurors shall be struck from the list, and the ground of exemption recorded" (3 *Rev. Stat.*, § 698, § 20).

IV. The commissioner of jurors is a *ministerial officer*, and in no sense a judicial officer.

The court still has all the power that it ever had over jurors, but it is relieved from the routine business of attending the preparation of the jury list and summoning of jurors.

The commissioner in the city of New York is substituted for town officers in other parts of the State, and it cannot be claimed that they are judicial officers (3 *Rev. Stat.*, 695, §§ 4, 5).

That he is a ministerial officer is apparent from the provisions of the statute.

(a.) He is appointed by the judges, just as they appoint clerks and criers (3 *Rev. Stat.*, 697, §§ 15 to 19).

The commissioner appears in his true character in § 34, where he is called a "clerk" of the board for the selection of grand jurors (3 *Rev. Stat.*, 701, § 34).

Neither judges nor supervisors could appoint a judicial officer without violating the Constitution. Judicial powers cannot be delegated (*Entick v. Carrington*, 19 *How. St. Tr.*, 1063).

(b.) The statute reads: "The *said* jurors shall be *selected*" by the commissioner (3 *Rev. Stat.*, 697, § 15). The word "said" is explained by § 14, as "all persons *residing in said city*, who shall be qualified to serve as jurors." These qualifications are *fixed by law* (3 *Rev. Stat.*, 695, § 5, and 697, § 14).

All the commissioner has to do is "*to select*" certain designated persons; he has no discretion in this (§§ 15-20).

After this selection he must give notice that the jury list is ready for correction, and must strike from it the names of exempts (3 *Rev. Stat.*, 698, §§ 20).

He has no discretion to determine who are exempt: that is *fixed by law*.

But if *exempts* do not apply to be excused, they cannot be

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held for duty; and the court always discharges them when summoned.

It would be ground for challenge to the array, if an unqualified person, *ex gr.* a non-resident, were upon the jury (3 *Blackst. Com.*, 351-359).

(c.) The commissioner cannot fine jurors for non-attendance: the court must do this (3 *Rev. Stat.*, 698, § 21). And the court may, as it constantly does, excuse jurors from serving, without consulting the commissioner. And the court may remit the fine *for any reason that it thinks fit*, as it constantly does. The commissioner may also remit the fine; but he can only do this upon "legal excuse" fixed by law (3 *Rev. Stat.*, 698, § 22). That the courts have the right to excuse from duty and to remit fines, as is their practice, is apparent from § 25, which provides that defaulting jurors must be excused by the court, unless this power is specially delegated to the commissioner by order of the court; and from § 21, which provides that the court must ascertain whether the jurors have been duly summoned, before it can fine them.

(d.) The conclusion of the matter is, that the commissioner, like other officers of the court, is under the direction and control of the court, and holds office to relieve it of burdensome ministerial duty, and has no general discretion, and can only exercise certain powers clearly defined and fixed by statute; and that other powers of a much higher grade connected with the jury system, were never intrusted to the commissioner, and may be exercised by the court at its discretion.

(e.) The duty of a clerk in "approving" an official bond is ministerial, and may be enforced by a mandamus (*Gulick v. New*, 14 *Ind.*, 93). The register may be compelled by mandamus to satisfy a mortgage (*The People, &c. v. Miner*, 37 *Barb.*, 466). And both of these acts require an exercise of judgment and discretion, not necessary in selecting jurors pointed out by law.

V. But granting (for the argument only) that the commissioner is a judicial officer, it clearly appears from the statute (see last point) that he has no general discretion; but that his conduct is governed by fixed principles and rules, from which he cannot depart. The qualifications of jurors are fixed by law. All the commissioner has to do, is to select the designated persons. It is well established that the discretion with which courts will not interfere is such as is general, and not regulated

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by fixed principles, and that whenever the discretion is fixed by law, the courts will control that discretion by mandamus (*The People v. Superior Court*, 5 *Wend.*, 114; and *Ibid.*, 10 *Wend.*, 285; *Hull v. Supervisors of Oneida Co.*, 19 *Johns.*, 259). The law is thoroughly discussed in *Manor v. McCall* (5 *Geo.*, 522).

VI. The statutes relating to the commissioner nowhere provide in terms that he shall not be subject to the control of the Supreme Court. And without such express enactment he is subject to it. "The authorities cited show that the right to review cannot be taken away without an unequivocal declaration to that effect by the legislature. They show that the superior courts in England and in this State have disregarded the strongest intimations of the legislative will, unless they came up to this standard; and the law may be considered as settled, that language as emphatic as that contained in this statute will not deprive a party of the right of review. In justification of this strictness, it has been alleged that administrative and judicial, or quasi-judicial, powers are frequently delegated to men without legal experience, who may err through ignorance, or abuse their trust from interested motives. It has, therefore, been deemed indispensable to the security of the citizen that a superintending power should exist somewhere, over inferior courts and officers, to restrain irregularities, and to correct errors of law, and, above all, errors of jurisdiction" (Per GARDINER, J., delivering the opinion of the Court of Appeals in *Matter of Canal, &c. Street*, 12 *N. Y.*, 411, 412; see, also, point V. of *N. Hill*, *Id.*, 407).

VII. The order setting aside the mandamus should be vacated, and the defendant declared to be in contempt for not obeying the same.

By THE COURT.*—INGRAHAM, P. J.—We are not furnished with the evidence on which the relator applied to the commissioner of jurors to have his name stricken from the list of jurors, and therefore we cannot decide whether he was entitled thereto, and the only question before us on this appeal is whether a mandamus will lie to the commissioner of jurors for such a purpose, if it be conceded that the relator is entitled to the relief he asks.

The office of this writ is twofold: one when addressed to

* Present, INGRAHAM, P. J., and LEONARD and BARNARD, JJ.

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courts of inferior jurisdiction, and to judicial officers, and to officers exercising judicial powers, to compel them to act and to decide on matters before them; the other when addressed to ministerial officers, to do the act which they are charged with unlawfully refusing to do. The commissioner of jurors is not a judicial, but a ministerial officer. It is true he has to decide on the sufficiency of the excuse offered by a juror to have his name stricken from the list of jurors, but still the nature of that excuse, and the duty of the officer, is clearly defined by the statute, and when the truth of the facts relied on is shown to him, he has no discretion to exercise, and has no right to keep the name of the juror on the list. If the statute vested any discretion in the officer, the rule is different. In the language of EMOTT, J., in *The People v. The Contracting Board* (27 *N. Y.*, 378), there must be a clear legal right not merely to a decision, but to the thing itself.

There is, also, another principle applicable to this writ—that it issues where the party has no other remedy. There could be no other remedy to the relator but to bring a *certiorari* and review the proceedings of the commissioner in that form of proceeding. That his acts are subject to review in one or the other mode, there can be no doubt. It never was the intent of the law to leave this officer at liberty to exercise an arbitrary control over those who are to form the list of jurors. The law has particularly enumerated those who are to be placed upon it, and he is bound to comply with those provisions. The objection to a review by *certiorari* is, that it would bring up the whole record, which he is required to keep, and where such a course would lead to great inconvenience, the courts have held that the writ of mandamus might be resorted to. This rule is stated by MITCHELL, J., in *Adriance v. The Supervisors* (12 *How. Pr.*, 226), where he says, "The general principle may be stated, that where a specific duty is imposed on public officers by statute, and they do not conform to the statute, and the omission to perform affects a particular party only, and not the whole list, a mandamus will issue."

Nor is this remedy to be withheld because the relator might have an action for damages. Judge MITCHELL, in the last cited case, says, "It is better for the public that the specific remedy be applied to removing the wrong directly, than to have actions for damages, in which the officer may be punished, although he

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erred only in judgment." So, in *The People v. The Mayor, &c.* (10 *Wend.*, 393), it is said that where a specific duty was imposed by statute on a public officer he may be compelled to execute it by mandamus, although an action for damages might also lie. In the case of *The People v. Miner* (37 *Barb.*, 466), the writ issued to the register to compel the satisfaction of a mortgage, although in that case he had to decide upon the sufficiency of the satisfaction piece, and SELDEN, J., in *The People v. The Contracting Board* (*supra*), says: "There are many questions requiring the decision of ministerial officers which involve, to some extent, the exercise of legal discrimination in their solution, but which are not regarded as judicial questions, and consequently the decision of them is not conclusive in collateral proceedings."

My conclusion is that the writ may issue to this officer.

The list in which the relator's name is inserted has ceased to be of any importance, as the period of time for which it was to be in force has expired. There is no propriety therefore now in issuing the mandamus, and nothing can be done except to reverse the order of the special term as to the power of issuing this writ in this case.

Order reversed.

GREER *against* THE MAYOR, &c., OF NEW YORK.

New York Superior Court; Special Term, April, 1866.

MEASURE OF DAMAGES.—NEW TRIAL.—MISTAKE.—LACHES.—
OFFICER OF MUNICIPAL CORPORATION.

In an action by the tenant for life, for damages to the estate, it is error to estimate the value of his estate by the present value of the rents and profits multiplied by the number of years probable duration of his life, without any deduction for annual charges, or rebate of interest for the time allowed.

A verdict assessed upon such a method of computation may be set aside on the ground of mistake, inadvertence, or excusable neglect, even after a motion for a new trial has been denied, and judgment has been entered.

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The criterion of what is excuse for laches in practice, which is applicable to individuals generally, is not to be strictly applied to the law officer of a municipal corporation, to the prejudice of the rights of the public whose officer he is. In a clear case of excusable negligence and palpable error, the court may grant relief on terms, even after a delay which might bar the application of an ordinary suitor.

Motion to open a judgment.

The facts are fully stated in the opinion.

Richard O'Gorman, counsel to the corporation, for the motion.

C. F. Sandford and *L. B. Woodruff*, opposed.

MONELL, J.—Two actions were brought against the corporation of the city of New York to recover damages for injury to the building on the southeast corner of Broadway and Twenty-ninth street, known as No. 1,192 Broadway. In July, 1863, a mob of rioters attacked the building, set it on fire, and it was totally destroyed. One of such actions was brought by the plaintiff to recover for injury to his estate in the premises as tenant by the curtesy *initiate*, and the other of such actions was brought by Ann Greer, the wife of the plaintiff, to recover for injury to her estate as owner of the fee. The plaintiff's action was tried by a justice of this court and a jury, and resulted in an assessment of the injury to the plaintiff's estate at twenty thousand five hundred and twenty dollars, for which sum, with interest, he obtained a verdict. A motion was made upon the justice's minutes for a new trial, which was denied. Judgment was thereupon entered, and the defendants appealed to the general term of this court from both the judgment and order.

The case made by the defendants, for the purpose of presenting the questions of fact or law, to be reviewed by the general term, contained no part of the evidence given on the trial, and only a single exception, namely, to the allowance of interest. Certain facts were said to have been established, namely, the nature of the plaintiff's estate; the destruction of the buildings, and the value in money of the injury to the plaintiff's life estate; but no evidence was furnished to the court to enable it to determine whether the plaintiff's damages were ascertained upon correct principles. There being no evidence to review,

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and the only exceptions taken being considered wholly untenable, the court affirmed the judgment and order.

The action brought by Ann Greer was subsequently tried by another justice of this court without a jury. Proof was adduced which established the whole value of the property destroyed at and not exceeding thirty-seven thousand four hundred dollars. The age of George Greer, her husband, was ascertained to be sixty-nine. The justice thereupon computed the value of his life estate upon the principle applicable to life annuities, and deducted such value from the gross value of the property destroyed, and gave judgment in favor of Ann Greer for the remainder. In ascertaining the value of the life estate the justice computed the interest upon the whole value (*i. e.*, thirty-seven thousand four hundred dollars) at six per cent., and multiplied the interest by the number of years' purchase furnished by the Carlyle annuity tables. Such computation was made pursuant to the directions contained in the eighty-fourth rule of court, prescribing the mode of computation in such cases. The value of Ann Greer's estate, as the owner of the fee, as thus established, was twenty-three thousand seven hundred and ninety-four dollars. Taking, however, the sum of twenty thousand five hundred and twenty dollars, recovered by George Greer, as the value of his life estate, and the sum of twenty-three thousand seven hundred and ninety-four dollars recovered by Ann Greer, as the value of her estate, we have an aggregate of forty-four thousand three hundred and fourteen dollars, or six thousand nine hundred and fourteen dollars more than the entire and highest proven value of the whole property destroyed.

A motion was now made to set aside, vacate or open the judgment recovered in favor of George Greer, and for a new trial; or that the defendants be permitted to renew their motion for a new trial upon the minutes of the court, and for a resettlement of the case prepared for the appeal, by inserting therein the evidence given on the trial, and for a re-argument thereof.

Upon this motion it now appears that considerable evidence was given on the trial of the George Greer suit, which was necessary to enable the jury to ascertain the value of his life estate; and it further appears that the principle adopted for ascertaining such value was by proof of the present value of the rents and profits of the premises for one year, and multiply-

ing such value by the number of years, which, by the annuity tables, would be the probable duration of the plaintiff's life. No deduction appears to have been made for taxes, repairs, or insurance, the two former of which are chargeable upon the life tenant; nor was there any reduction or rebate of interest upon the annual rental thus, in effect, paid in advance for the ensuing six or seven years. This motion is now made upon the ground that, through mistake, inadvertence, error or otherwise, the plaintiff has recovered at least six thousand nine hundred and fourteen dollars more than upon any principle properly applicable to the facts of the case he is entitled to recover.

I do not entertain a doubt that the plaintiff's recovery was too large, and I am therefore clearly of the opinion that if no well settled principle of law or of the practice of the court is violated, the defendants ought to have an opportunity to correct the error. The power to do so is given in express terms by the 174th section of the Code, which provides that the court in its discretion, and upon such terms as shall be just, may relieve a party from a judgment, error or other proceeding taken against him, "through his mistake, inadvertence, surprise or excusable neglect." I cannot persuade myself that the mode of ascertaining the damages in this case was adopted by the court or assented to by the counsel to the corporation, upon a full and careful examination of the question. Indeed, it does not appear that any question as to the correctness of the rule was raised on the trial, and it seems to have been tacitly assumed that it was the correct rule. I am, therefore, led to believe that through inadvertence, or, perhaps, excusable neglect or mistake of the counsel for the defendants, the case was allowed to go to the jury upon what I deem to have been a clearly erroneous rule of damages.

Under such circumstances I can have no hesitation in opening the case for a re-investigation, if the inadvertence or neglect has been excused. Great laches in seeking relief from mistakes are generally a complete answer to a motion for such relief; and courts will always, and very properly, scrutinize closely any attempt to avoid consequences, which a party has brought upon himself by his own act; and great delay in applying for relief is always a circumstance of suspicion, and will incline the mind to doubt the good faith of the application. But where there is no reasonable ground to question the integrity of the applica-

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tion, and where no principle of law will be invaded and the neglect is excused, there should be no reluctance to afford relief.

This action was defended by the counsel to the corporation, who is the law officer of the city. The answer of the defendants put in issue all the allegations in the plaintiff's complaint. The action was tried at the May term in 1865, and evidence to establish the plaintiff's cause of action and the basis upon which the jury were to estimate the plaintiff's damages, given, and the jury were instructed to adopt the rule of damages claimed by the plaintiff and assented to by the corporation counsel, as the correct rule. The case on the appeal was heard in the succeeding October general term and decided at the November general term. The incumbent of the office of the counsel to the corporation during these proceedings was succeeded in his office by the present counsel on the first of January last, and the pending suits and proceedings against the corporation were at that time delivered to him. It does not appear that the error now complained of was discovered by the late corporation counsel, who does not appear to have been aware that any doubts could be entertained of the correctness of the rule adopted and to which he yielded on the trial, no doubt believing it to be the correct rule. The present corporation counsel, when he entered upon his office, found a mass of unfinished litigation, which, with his other duties constantly accumulating, rendered it impossible at once to investigate all the cases in his office. Yet this motion is made in a little over two months from his assumption of office. The counsel to the corporation is an independent department of the corporate government, and represents the inhabitants of the county. He has charge of and is responsible for the conduct of all suits and proceedings against the city. To him are confided interests of great magnitude and importance, and it is his duty, independently of any other department, to defend the city and the taxable inhabitants thereof against all actions which in his judgment cannot be sustained; and it is also his duty, whenever in his judgment the interests of the city and its taxable inhabitants require it, to institute lawful proceedings to relieve them from any improper burthen. And the duty is none the less imperative whether the burthen has been imposed through mistake of himself or of his predecessor in

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office, or mistake of any other department of the city government.

The measure of neglect which is applied to cases against individuals for their own acts or neglect, for which they are themselves responsible, ought not to be applied to public functionaries representing parties who are made liable for acts or omissions of which they are ignorant. The principle of the maxim, *Nullum tempus occurrit regi*, in a modified form, is applicable to such a case, namely, that the community or its representatives cannot always be supposed to be aware of an unjust invasion of its rights. The corporation of New York has no entire control over their counsel, he being an elective officer, so as to direct or change him; and unless the courts can afford them protection or relief, when brought to their notice, serious losses might fall upon the city treasury by the neglect or delinquency of an irresponsible official.

The several adjudications in this case, which it was so strongly urged should be regarded as concluding the corporation upon this motion, do not afford, it seems to me, a sufficient reason for withholding the relief they now seek to obtain. I believe an error was committed on the trial of the action which should not go uncorrected, if the court have power to correct it. And the plaintiff should not object, as I believe he will not, to have his judgment reduced, if he has recovered more than the law awards him.

I am, therefore, of opinion that so much of the motion as is necessary to give the defendants the relief they seek should be granted on terms. The neglect to apply at an earlier day is to my mind sufficiently excused, and the defendants should not be injuriously prejudiced by the delay of a public official, more especially as the plaintiff cannot be injured, except by a short prolongation of his action.

I do not intend, and I mean it shall be so understood, that this decision shall be regarded as a precedent or as affording any encouragement to relaxing proper attention to the defence of suits against the corporation. In conducting the large law business devolving upon the counsel to the corporation mistakes and errors are almost inevitable, and more or less delay cannot, probably, be avoided; but only in clear cases of excusable negligence or palpable error will the courts feel inclined to relieve the corporation from the consequences of mis-

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takes of the city officials. I have come to the conclusion, with much hesitation, however, that the order denying the motion for a new trial and the order affirming the same should be set aside, the case resettled and a re-argument ordered. In no other way, without the consent of the plaintiff, can the error complained of be corrected. An order may be entered that unless the plaintiff, within twenty days from the entering and service of the order upon this decision, stipulates in writing to deduct from his judgment the sum of six thousand nine hundred and fourteen dollars, with interest from September 23, 1863, then that, upon payment by the defendants to the plaintiff of all the costs in the action since the trial, including the costs of the appeal to the Court of Appeals, to be taxed, and of ten dollars costs of opposing this motion, the defendants have leave to re-settle the case and reargue their motion for a new trial at the special term; and that the order denying the motion for a new trial on the minutes of the justice and of the judgment affirming such order be vacated and set aside; and that until the decision of such motion all proceedings on the judgment be stayed.

*Affirmed
& doct. 660*HENDRICKS *against* CARPENTER.*New York Superior Court; Special Term, January, 1864.*

OPENING INQUEST.

After the lapse of two years from the entry of judgment upon an inquest, and the giving notice thereof to the defendant, the parties having been resident within the jurisdiction of the court, a motion to open the inquest will not be entertained.

Motion to open a judgment.

Sheffington Sanway, for the motion.

John Pyne, opposed.

McCUNN, J.—In this case a motion was made to open an inquest and set aside a judgment entered at trial term.

After a careful inspection of the entire case, and after examining the law, I find that it is quite out of my power to grant the relief claimed.

The action was for a money demand on contract. The parties reside within the jurisdiction of the court, and are fully under its control.

This being so, and more than two years having elapsed since the perfection, entry and notice of the judgment upon the defendant's attorney, the 174th section of the Code steps in and precludes me from interfering.

Other points were raised in the case, but, as this is the principal and overshadowing one, I refrain from saying more in the premises.

Motion denied, with ten dollars costs.

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ny. 131.*
The Madison Avenue Baptist Church v. The Baptist Church in Oliver Street.

THE MADISON AVENUE BAPTIST CHURCH *against*
THE BAPTIST CHURCH IN OLIVER STREET.

New York Superior Court; General Term, January, 1866.

RELIGIOUS CORPORATIONS.—PROCEEDINGS FOR SALE AND CON-
VEYANCE OF THEIR REAL ESTATE.—AMALGAMA-
TION OF CORPORATIONS.

Religious corporations have inherent power to alien their property; and although the statute requires an application to the court for leave to make any sale of their real property, this does not restrict their power to the making of sales for money. The court may sanction a conveyance for any proper purpose.

In these proceedings the better practice is to negotiate and agree upon the terms of the sale first, and then lay the agreement before the court for its sanction.

The application may be made by the Trustees, if it be shown that a majority of the corporators approve it.

Where the real and only consideration for the proposed transfer was a union between two societies, the terms of which appeared in the application and order;—*Held*, that this was a sufficient statement of the application of the moneys.

The title under the conveyance is not affected by indefiniteness of the order in respect to the application of the proceeds.

Their application may be directed by a separate order from that authorizing the sale.

Two religious societies may unite with each other, and a conveyance of the property of one, to the society so formed, may be sanctioned by the court, under the statute.

The case of *Williamson v. Berry* (8 *How. S. Ct.*, 495) disapproved.

Appeal from a judgment.

This action was to recover the possession of a plot of ground on the southeasterly corner of Madison avenue and Thirty-first street in the city of New York.

Prior to the 21st of October, 1862, the plaintiffs, a religious corporation, were the owners of the plot in question, and had erected thereon a church edifice, which they occupied as a house of worship.

The complaint alleged the ownership of the plaintiffs, and the entry of the defendants. The answer, after denying all

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the allegations in the complaint not afterwards admitted, for a further and separate defence, set forth certain facts, which will sufficiently appear in the offers of evidence made on the trial.

The action was tried by Mr. Justice McCUNN, without a jury.

On the trial, the plaintiffs proved a deed to themselves of the lot in question, dated August 1st, 1859, from Catharine Vanderpool, and the possession of the defendants.

The defendants then offered in evidence a petition, resolutions, consents, and order thereon, annexed to and forming a part of their answer.

The petition was addressed to "The Supreme Court," and was by "*The Trustees of the Madison Avenue Baptist Church.*" It is stated that the Madison Avenue Baptist Church was a religious incorporation, and the owner of the lot on the southeasterly corner of Madison avenue and Thirty-first street, on which they had erected a church edifice and lecture-room, at a cost, including the lot and an organ, of the sum of about one hundred and twenty-two thousand dollars. That their indebtedness therefor was about seventy-three thousand dollars, sixty-one thousand five hundred dollars of which was secured by mortgages upon the premises. That owing to causes set forth in the petition, they were unable to pay their liabilities, or meet the current expenses of the church. That the said Madison Avenue Baptist Church, and the Baptist Church in Oliver street, also a religious incorporation, and located in Oliver street in this city, and which had contemplated disposing of its property and moving up town, had formed a plan and made arrangements for uniting said two churches into one, and had agreed upon the following terms for such union:—

"*First.* The Madison Avenue Baptist Church is to convey "and transfer all its real and personal property to the Oliver "Street Baptist Church, and the members of the Madison "Avenue Baptist Church, are to become and be members of "the Oliver Street Baptist Church; and thereupon the regular "services of the united churches to be held in the house of worship owned by the Madison Avenue Baptist Church.

"*Second.* The Trustees of the Oliver Street Baptist Church "are to resign, and an election for new Trustees ordered by the "church and congregation united. The resignation of the

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“present Trustees to take effect when others shall have been elected.

“*Third.* The Oliver Street Baptist Church are then to take the necessary steps to cause its corporate name to be changed to the Madison Avenue Baptist Church.

“*Fourth.*—The real and personal property now owned by the Madison Avenue Baptist Church, and that owned by the Oliver Street Baptist Church, upon such transfer and union as aforesaid, is to become liable for the indebtedness of both said churches.

“*Fifth.*—As soon as practicable after such union shall have been perfected, and new Trustees elected, a sale of the pews in the Madison Avenue Baptist Church, at their present assessed value, is to be ordered, upon the same terms and conditions as provided by the form of deed formerly adopted by the Madison Avenue Baptist Church; at which sale, the present owners of pews heretofore sold, amounting together to thirty-one thousand dollars, are to have the right to purchase a pew or pews of equal value to those heretofore purchased by them, without further payment than the amount of premium which may be bid for choice, and are to receive a deed for the same. And the present members of the Oliver Street Baptist Church or congregation, also, are to have the right to purchase pews to the amount of thirty-one thousand dollars, without any payment, or merely a nominal one, except the amount of premium that may be bid for choice of pews.”

The petition then stated that the plan and terms for forming a union of the two churches had been agreed upon by a joint committee appointed by said churches, respectively; that such committees had reported to their respective churches the plan, arrangement and terms for the union of the two churches; and that at a public meeting of the church and congregation of the Madison Avenue Baptist Church, duly called, the report of their committee of the plan, arrangement and terms for the union of the two churches, “was adopted and approved, and the Trustees of the Madison Avenue Baptist Church authorized and directed to petition the court for an order authorizing them to convey the property of the Madison Avenue Baptist Church to said Oliver Street Baptist Church, in pur-

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"suance of the plan and arrangement for the union of the said two churches on the terms above stated."

The petition further stated, that, at a public meeting of the Oliver Street Baptist Church and congregation, the report of their committee of the plan, &c., of the union, was adopted and approved, and the Trustees were authorized and directed to take the necessary legal steps to perfect the union of the two churches; and that, subsequently, the Trustees of the Oliver Street Baptist Church had adopted a resolution pledging themselves to carry out and perfect the union of the two churches.

The petition further stated, that the Oliver Street Baptist Church owned property, over and above all their indebtedness, of the value of from fifty to sixty-five thousand dollars, which, on the consummation of the union, would become applicable to the payment of the debts and liabilities of the Madison Avenue Baptist Church. That a portion of the pew-holders of said church had consented to the transfer of the property, and that the residue of said pew-holders had approved of, and were in favor of forming the union.

The petition then prayed for an order authorizing and directing the petitioners, "*to convey*" the said premises to the Oliver Street Baptist Church. Annexed to the petition was an authenticated copy of the proceedings of the meeting of the congregation of the Madison Avenue Baptist Church, which had approved of the plan of the union; and also the consent of the pew-owners and holders.

Upon such petition, the court made an order authorizing and directing the Trustees of the Madison Avenue Baptist Church, "*to convey*" by a proper deed of Conveyance, the said premises to the Oliver Street Baptist Church. The order was afterwards amended, by changing the words "the Oliver Street Baptist Church," to "the Baptist Church in Oliver Street."

The plaintiffs objected to the papers offered on the several grounds:

1st. As immaterial. 2d. That it appeared on the face of the papers that the proceeding was void. 3d. That it did not appear that it was authorized by a majority of the plaintiffs' corporators. 4th. That it was a petition and order simply to *convey*. 5th. That it purported to be made by the trustees and not by the corporators.

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The defendants then offered in evidence a deed dated October 21st, 1862, from the Madison Avenue Baptist Church, to the Baptist Church in Oliver Street, conveying to the latter the premises in question, for the expressed consideration of five dollars.

The defendants then offered to show, that under that deed they entered upon the customary religious services in the church edifice conveyed by such deed, in connection with the plaintiffs, and by their consent, and that the two congregations united in such services.

The defendants further offered to show a petition and order for the change of their corporate name to the Madison Avenue Baptist Church, in pursuance of the agreement aforesaid. Also, that they had sold their church property in Oliver street, in execution of the agreement for the union of the two churches; and that all the conditions and terms of the union, as set forth in the petition, had been fully carried out and performed by the parties respectively.

To each and all of the evidences offered, the plaintiffs objected. The court excluded all and each part of the evidence offered, on the ground that the same would not establish, or tend to establish, a defence. To which rejection of such evidence, the defendants excepted.

In the view taken by the court, it is not necessary to state the further evidence offered on the part of the defendants, and excluded on the trial.

The justice rendered judgment in favor of the plaintiffs, that they recover possession of the premises, with costs. The decision is reported in 19 *Abb. Pr. (O. S.)*, 105.

From the judgment the defendants now appealed.

L. B. Woodruff, for the defendants, appellants.

J. S. Bosworth, and *James T. Brady*, for the plaintiffs, respondents.

BY THE COURT.—MONELL, J.—The common law right of alienation, as well as the power conferred by the Revised Statutes (2 *Rev. Stat.*, 556, § 1, *sub.* 4), upon corporations generally, to convey their real property, is restrained in its application to religious corporations, by the 11th section of the act providing for their incorporation (2 *R. L.* [1813], 212). That section pro-

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vides, that upon the application of a religious corporation, it shall be lawful for the court to make an order for the sale of any real estate of such corporation, and to direct the application of the moneys arising therefrom. Without such an order, any sale made by a religious society is void (*Manning v. Moscow Presbyterian Society*, 27 *Barb.*, 52).

The objections to the order in this case are four-fold:

First. That the court had the power to order only a *sale*.

Second. That the application for the order was made by the Trustees, and not by the corporation.

Third. That the order did not direct the application of the moneys arising from the sale; and

Fourth. That the transaction produced a dissolution and abandonment of the plaintiffs' corporation, and not a continuance of it for the purposes of its organization.

The petition of the Trustees does not ask for an order to *sell*, but for an order to *convey*, pursuant to an agreement previously made between the parties, and set out at length in the petition.

If such agreement was a proper one, such as should receive the sanction of the court, and would conduce to the temporal and spiritual welfare of the corporation, it would seem to be of not much importance, whether the application was in the one or the other form.

It was contended, however, that as the court can make an order only for the *sale*, the statute giving the power must have a literal compliance.

The section referred to, confers no power upon religious corporations to alien its property. None was needed. The power is inherent in every corporation, which, at common law, has an unlimited authority over its property, and could alienate the same in fee by grant or otherwise (*Co. Litt.*, 44 a, 300 b; 1 *Burr*, 221). And a like power is given by the Revised Statutes, before referred to. Neither does the section *take away* the power of alienation. It merely limits its exercise, by requiring the corporation to obtain the consent of the court, and so far, only, it operates as a restraint upon its alienating powers.

If the right of a religious corporation to sell its property was derived *solely* from the statute, and the power was limited in *terms* to a sale, it might be, that a literal observance would be required. But where the corporation has the power to sell,

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independently of any statute, upon merely obtaining the sanction of the court to the sale, a substantial compliance with the spirit and intent of the section referred to, should, it seems to me, be deemed sufficient.

The restraint placed upon religious corporations, was intended to prevent an improper alienation of their property. An unlimited power of alienation could be exercised by a corporation injuriously to the temporal interests of church societies, and the cause of the Christian religion. But when the purposes of a sale are proper, and in no wise opposed by the policy or design of the statute, no court would be justified, in my opinion, in withholding its consent, merely because the corporation had applied for permission to convey.

It will be seen that the section referred to, authorizes the court to make an order for the "sale," and not for a sale and "conveyance." A sale without a conveyance would be wholly ineffectual to pass title to real property; and the use, therefore, of the word "sale" only, in the statute, would seem to indicate, that it was intended to give to the word a signification sufficiently broad, to include conveyance. An agreement to sell, always implies an agreement to convey, as a necessary means of transfer to complete the sale; and an agreement to convey, implies a sale agreed upon, which needs only a conveyance to consummate it.

The plaintiffs agreed with the defendants, "to convey and transfer" all their property. Such a contract, independently of any restraining statute, would be sufficient as a contract of sale; and under the statute, as a contract, its specific performance could have been compelled, by requiring the plaintiffs to apply to the court for its consent.

In the case of *Williamson v. Berry* (8 *How. S. Ct.*, 495), to which we were referred, Mr. Justice WAYNE gives as a definition of the word "sale," a "contract to give and pass rights of property for money," and he held, that an authority given to Clark by the legislature, "to sell and convey," did not authorize a conveyance in payment of his debts. If that learned justice intended so contracted a signification to the word as he expresses, it would render void all transfers of property not founded on a money consideration, which it cannot be believed he designed. As a decision, however, it is wholly unsatisfactory, and must be considered as overruled by *De Ruyter v. St. Peter's Church*, 3

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N. Y. [3 *Comst.*], 238, where an assignment by a church of its property for the payment of its debts, was upheld.

All that the statute requires is, that the *sanction* of the court approving the sale shall be procured. But to enable the court to form a judgment, it must be put in possession of all the facts which furnish the reasons for the sale. In the case of *The Dutch Church in Garden Street v. Mott* (7 *Paige*, 77), the late Chancellor says: "As the law of patronage has never been extended to this State, and was inconsistent with the spirit of our institutions, it became necessary to vest in some tribunal the power of *sanctioning* alienations of church property," and, therefore, the intention of the act of 1816 (which was the same as the act of 1813) was to give to religious corporations an unlimited power to convey any real property held by them in trust for the corporators: provided, the previous consent of the court to such alienation was obtained. And in *Matter of Reformed Dutch Church in Saugerties* (16 *Barb.*, 237), Judge HARRIS says: "It was deemed necessary for the protection of those who are the real owners of such property to require the sanction of that officer before the corporation could make a valid conveyance." But the chancellor could only ratify or veto the sale.

As I have already stated, if the reasons are good and the object proper, it is of small importance in what *form* the sanction of the court is obtained; and where such reasons, and object, and the purpose to which the considerations for the sale is proposed to be applied, are fully stated in the petition, and the court thereupon ratifies the agreement, and directs a conveyance in pursuance of its terms, and in fulfilment of it, it does not seem to me, that any provision of law would be violated. It is not uncommon, in applications by religious societies desiring to sell their church property, to state the proposed application of the moneys arising therefrom. It was done in *De Ruyter v. St. Peter's Church* (*supra*). In that case, the corporation being insolvent (see *S. C.*, 3 *Barb. Ch.*, 120), the Trustees resolved to convey all its property to Trustees for the payment of its debts. Their petition, presented to the vice-chancellor, was for an order permitting the corporation to sell and convey its property to Trustees, "in trust as aforesaid;" and an order was made according to the prayer of the petition. Not only the reasons for the sale, but also the proposed manner of applying the proceeds were stated in the

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petition, and the chancellor says it was a matter of discretion with the vice-chancellor, whether he would make the order or withhold his consent. The practice of negotiating and agreeing upon terms first, and then laying the agreement before the court for its sanction, is approved in *Bowen v. Irish Presbyterian Church* (6 *Bosw.*, 245). Indeed, it would be singular if it were required that the contract of sale should succeed and not precede the allowance of the court. Whenever, therefore, a religious society has resolved to dispose of its property, and has agreed upon the terms and conditions of sale, and the application to be made of the money arising therefrom, it is in a condition to seek the sanction of the court, and such sanction may properly be of the entire agreement.

The next objection is that the application was not made by the corporation, but by the Trustees.

The petition states that, at a meeting of the church and congregation, duly called, the Trustees were authorized and directed to make application for leave to convey.

A religious corporation consists of the persons who have been stated attendants upon divine worship for one year, and have contributed to the support of the church, according to its usages and customs. Such persons are also the corporators. All corporations act through and by their officers, or other constituted agencies to which the corporators have delegated the power to act; and, especially, are the Trustees of religious corporations invested with the custody, care and supervisory control of all the temporalities appertaining to the church, and through them alone the corporation can act.

The direction and authority given to the Trustees, made the application as much the application of the corporators, as if each individual had signed the petition. The statute does not prescribe any form, nor does it *in terms*, require that a majority of the corporators should unite. No corporation, however, can act unless its action is invoked by a majority of the corporators. This rule is applicable to all bodies, unless a less number are given the power by some special provision of law. The statute being silent, the court will intend, for the purpose of acquiring jurisdiction, that a sufficient number have authorized the application. But the cases of *Matter of St. Ann's Church*, 14 *Abb. Pr.*, 424; and *Matter of Baptist Society of Canaan*, 20 *How. Pr.*, 324, go farther, and hold that

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the Trustees may make the application irrespective of any vote of the corporators.

The case of *Wyatt v. Benson*, 14 *Abb. Pr.*, 182, cited by the plaintiffs' counsel, is not opposed. The application in that case was by a majority of the *Trustees*; and, it appeared on the part of those *opposing* the application, that a large majority of the corporators were not favorable to it. If the opposition had not appeared, the learned Judge who gave the opinion, says: "It might be *assumed* that the Trustees represented the views of the corporators in making the application." But the order in that case, being *in fieri*, the court revoked its sanction, on the ground that a majority of the corporators were opposed to a sale.

All difficulty in the way of the case before us, is removed by the statements made in the petition and the papers annexed to it. It says there were *sixty-seven* pew-owners, or pew-holders, of whom *forty-one*, or nearly two-thirds, had signed a written consent and request that an order be made directing the Trustees to convey. It further states that all the other pew-owners and pew-holders were in favor, and approved, of forming the union of the two churches. Besides, the proceedings of a public meeting of the *Church and Congregation*, called pursuant to public notice, which are annexed to the petition, show an express authority from the corporators to the Trustees. There was, therefore, an abundance of evidence before the court to show that the application had the approval of all the corporators.

The *third* objection is, that the order does not direct the application of the moneys arising from the sale.

The consideration for the sale was not the nominal sum of five dollars named in the deed.

The agreement set out in the petition by which the defendants agreed to assume and pay the plaintiffs' debts, amounting to seventy-three thousand dollars—to unite with the plaintiffs in forming one church organization—to adopt the plaintiffs' corporate name—to sell their property in Oliver Street—to cause the resignations of its own Trustees, and to provide for the selection of new Trustees by the United Church and congregation, constitutes the real and only consideration for the transfer; and the Court was asked to give its sanction to that agreement and nothing more. Judge DENIO says, in *Wheaton*

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v. Gates, 18 *N. Y.*, 375, that, "as to the disposition of the proceeds, the court has no power to originate any scheme, or even to *execute* any enterprise determined on by the corporation, *but only to allow or disallow the application of the moneys to such purposes as the corporation shall represent to be most for the interest of the Society.*" The allowance by the court of the application proposed by the Trustees in this case is sufficiently shown by the order it made; and, it appears to me, it could not have been shown in a more satisfactory or effectual a manner.

But, even if the order should have been more specific, it cannot affect the title made under it. The court having jurisdiction, any mere irregularity or insufficiency in the proceedings subsequent to the petition was amendable, and would probably be cured by the action of the parties under it. Besides, the order allowing the sale might have been made separately from the order directing the application of the proceeds. In *Matter of Brick Presbyterian Church*, 3 *Edw.*, 155, the Vice-Chancellor made a provisional order allowing a sale to be made, "if a proper site for a new church could be obtained."

I do not think, in this case, that it was required that the order should do more than sanction the arrangement by ordering the conveyance to be made. That was a substantial compliance with the statute.

The remaining objection is one of more difficulty.

It is contended, that by the consummation of the sale of the plaintiffs' property, their corporation became extinct, and that such result, being opposed by the policy of the statute, rendered the whole transaction void.

The object of the statute was to prevent improper dispositions of church property. The framers of the law must have feared that cases might arise where it would be proper to put a restraint upon the power of alienation, and they have, most wisely I think, given to the court the discretion to sanction, or withhold its sanction, in all cases. In any given case, the propriety of a sale must be determined by the court. If the application comes up in proper form, with the facts necessary to give jurisdiction, the court alone is authorized to judge of the expediency of the sale; and the duty to direct the application of the money arising therefrom, in a measure, controls

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and prevents any improper exercise of the discretion of the court.

But it is said the transaction between these parties, although sanctioned by the court, was not such a transaction as should be sustained. Let us see what it was.

The Madison Avenue Baptist Church had purchased lots, and erected thereon a church edifice, at a cost of one hundred and twenty-two thousand dollars, and were in debt to the amount of seventy-three thousand dollars. Owing to derangements of business, and of the finances of the country, and the existence of the war (1862), they had failed to realize from subscriptions, or the sale of pews, what they had anticipated, and were, therefore, unable to pay their liabilities, *or meet the current expenses of the church*. In this exigency, it was found that the Baptist Church in Oliver Street had resolved to sell their church property, and remove up town. It was also found that the church in Oliver Street would have a surplus in money, on a sale of their property, of about sixty-five thousand dollars. The Church in Madison Avenue sought the union, and it was finally agreed, *with the consent of all the corporators of each Society*, that the Oliver Street Church should take title to the Church in Madison Avenue; pay the debts and assume its corporate title; and thenceforward the two societies and congregations worship as one congregation in the same edifice.

It is quite clear that the arrangement was mutually advantageous, each party receiving a substantial benefit. The plaintiffs were at once relieved from the pressure of a heavily impending debt; and in this aspect, the sale may be regarded as a *quasi* transfer of their property in payment of their debts, within the principle of *De Ruyter v. St. Peter's Church, supra*. Although, in strictness, it dissolved the plaintiffs' corporation, and was an abandonment of their distinctive separate organization, in *reality* it was a mere union with another congregation, holding the same tenets, conforming to the same faith, and submitting to the same governmental discipline.

A corporation aggregate has perpetual succession in its Trustees, or officers vested with its temporal concerns. The officers may cease to act, but the succession continues. The change in this case was nominal, rather than real. The plaintiffs' corporators became corporators in the transformed Church, by force

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of the agreement; they were eligible to office, and entitled to vote. In short, the agreement guaranteed to all the corporators of the Madison Avenue Church the rights, privileges and powers in the united Church, which they had before possessed and enjoyed in their separate organization.

I am not prepared to say that if the sale had operated to extinguish the plaintiffs' corporation *as a religious denomination*, it would be free from exception. Yet such a sale, with a distribution of the proceeds among all the corporators, with the consent of all having an interest in the subject, would seem to be within the discretion of the Court to sanction and approve. (Matter of Church in Saugerties, *supra*).

The mere denominational character of a church may be changed by its corporators at pleasure (First Bap. Ch. v. Withere'll, 3 *Paige*, 296; Miller v. Gable, 2 *Den.*, 492; Robertson v. Bullions, 1 *Kern.*, 243; Parish of Belpport v. Tooker, 29 *Barb.*, 256). In the last case, the form of church government was changed from a Congregational Church to an organization in connection with the Presbyterian body.

The idea that the denominational or sectarian character of a church enters as an element into the act of incorporation, is exploded in the cases last cited. A society becomes incorporated as a religious, not as a sectarian body (Petty v. Tooker, 21 *N. Y.* 267); and the same principle which allows a majority of corporators to change the articles of faith, would seem to authorize a majority of two societies, entertaining the same belief, to unite and form themselves into one Church. And such a union, in my judgment, cannot be improper. An example of such a union is found in the case of Cammeyer v. The United German Lutheran Church (2 *Sandf. Ch.*, 186), where one Church Society transferred all its real and personal property to another Church Society, and the united churches thereafter worshipped as one congregation. It is true of that case, that neither of the Societies were incorporated at the time of the union; nevertheless, the case is an apt illustration of the propriety, as it is a pointed instance, of such a union.

I am not aware that any court has assumed to have jurisdiction over the spiritual body which constitutes the church, as distinguished from the temporal body, which consists of its members, and is represented by its Trustees. Over such spiritual body, legal or temporal tribunals do not profess to have any

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control; hence, all questions concerning the faith or practices of the church and its members, belong to the church judicatories in their connection; while on the other hand, such ecclesiastical judicatories cannot interfere with the temporal concerns of the society with which the church members are united.

I may state in this connection, that the society long in existence, instituted to aid feeble churches, has, where it was practicable, recommended a union of weak churches, upon the conviction, from long observation and experience, that the strength acquired by the union would add to the efficiency and usefulness of both.

The doctrine that contracts of corporation which are *ultra vires*, are void, does not receive favor with courts. Where parties have contracted in good faith with a corporation, and have executed their contract, and the corporation has received and accepted the benefits, it is not to be tolerated that they can be permitted to seek exemption, on the ground that they had no power to contract (*Feeter v. Heath*, 11 *Wend.*, 478; *State of Indiana v. Woram*, 6 *Hill*, 33; *Sherman v. N. Y. Central R. R. Co.*, 22 *Barb.*, 239). The only exception to this rule, are those cases where corporations are prohibited by some express provision of law, or are required to contract in some prescribed form (*Brady v. The Mayor, &c., of New York*, 20 *N. Y.*, 312; *Bonesteel v. The Same*, 22 *Id.*, 162). In this view it seems plain, that the plaintiffs could have been compelled specifically to perform their contract, by procuring an order to convey, and by transferring the title to their property to the defendants (*Fry on Spec. Perf.*, 233).

The case of *Wheaton v. Gates*, before referred to, seems to have been regarded by the learned justice at special term, as controlling. It was also insisted by the respondent's counsel that it was conclusive.

It is proper to say of that case, at the outset, that it was an action brought by a corporator for the purpose of having declared null and void an order of a county court, giving its sanction to a sale of church property. In that respect it differs from this case, which is an attempt to attack, collaterally, the validity of a similar order, which, in my opinion, can be done only by a direct action (*Clarke v. Van Surlay*, 15 *Wend.*, 436). The petition in the case cited, was verified by four only, of six Trustees, and had annexed to it the concurrence of a few only

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of the members of the society. The prayer was, that the church might be sold, and the proceeds, after paying debts, might be divided among the persons who held deeds of pews, in proportion to the sums paid by them. The referee, who tried the action, found as facts, that there was no necessity for selling to pay debts, and that the sole object was to effect a distribution of the proceeds among a portion of the members; and he decided that the order for the sale was void, "on account of the provision for the distribution of the proceeds among the pew owners." It nowhere appeared that any considerable number of the corporators, certainly not a majority, applied for the order. It is stated that several members of the society concurred, but it is evident from the statement of the case, that only a small portion of the members, and a bare majority of the Trustees, consented to the application. The decision of the court follows and adopts the decision of the referee, that there was no necessity for a sale to pay debts; and that the division of the proceeds among the pew holders was illegal, and rendered the order void. The decision, both of the referee and of the court, is based upon the fact that all the persons interested had not consented, and the learned judge says, "It was not in the power of the Trustees, or a majority of the members, or of the court, to abolish the corporation or dissolve the society."

But he seasonably adds, "If every individual having any interest in the matter should concur, it might be done."

As a decision, *Wheaton v. Gates* sustains these general propositions; that the statute confers no power upon the court to control or manage the property of religious societies; that the whole power of administration is conferred upon the Trustees, with the single qualification, that before they can sell they must apply to the court for its allowance of the transaction; and to allow or disallow the application of the moneys to such purposes as the corporation shall represent to be most for the interest of the society.

From these propositions it follows that upon an application for the sale of church property, the only duty of the court is to see—

First. That sufficient reason exists therefor; and

Second. That a proper disposition of the proceeds is made, and the case decides nothing more.

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I have examined the case before us, upon strictly legal grounds, and have endeavored to show, that the court had jurisdiction to make the order directing the plaintiffs to convey, and that the order was a proper one. It therefore becomes unnecessary to examine the other questions raised on the appeal.

If I am right in these views I have expressed, it follows, that the rejection of the evidence offered to establish the defence, was erroneous, and the judgment for that reason should be set aside.

But before concluding, I may be indulged, I hope, in a single suggestion in regard to another aspect of the case.

The entire good faith of the parties who entered into this mutually beneficial agreement, cannot for a moment be questioned. The promptness with which they carried it into immediate effect; and the desire they manifested to complete, in a spirit of fairness, what they had undertaken to do, cannot fail to satisfy any one that the intentions of the parties were upright. The plaintiffs procured permission to convey, and delivered their deed. The defendants sold their property in Oliver street; came into the plaintiffs' church and united with them, and as one congregation engaged in divine worship. Debts of the plaintiffs, amounting to upwards of fifty thousand dollars, were, in effect, paid, and the corporate name of the Madison Avenue Baptist Church retained.

So far the parties appear to have acted in strict accordance with their engagements. They came together in a spirit of fraternal love, and conformed to the faith and submitted to the discipline of the united church.

Having done this—having gone thus far, it would seem as if a Christian spirit, if not a better judgment, should have counselled acquiescence and peace.

Among men who do not profess the Christian religion, moral obligations are not always recognized. With such, the compulsory power of the law alone has its terrors. But there is, nevertheless, or should be, a conscientious sense of right and justice, and of moral duty, which ought to control the actions of men, and influence them in the discharge of their obligations, even where the law exempts; and, whatever may be the conceived legal rights of parties, if there is any moral duty unperformed, it

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should restrain them from the entanglements and consequences, always disastrous, of strife and litigation.

The judgment should be reversed, and a new trial ordered with costs to the appellants on the appeal to abide the event.

BARBOUR and GARVIN, JJ., concurred.

Judgment accordingly.

THE PEOPLE, *on the relation of* RYAN, *against* RUSSEL.

Supreme Court, First District; General Term, May, 1866.

HABEAS CORPUS.—JUDICIAL ACT.—CITY JUDGE OF NEW YORK.—MANDAMUS.

The city judge of the city of New York has power to allow a *habeas corpus*. It is, however, discretionary with him to allow the writ or not, in any case, and a mandamus will not lie to compel him to allow it.

Mandamus.

The relator was committed by a police justice upon a charge of forgery, and applied by his attorney to the city judge of New York, for a *habeas corpus*, on the ground that the commitment was insufficient. The city judge refused to grant the writ, and the relator applied to this court at general term, for a mandamus.

Elbridge T. Gerry, for the motion.

Abraham D. Russel, in person, opposed.

BY THE COURT.*—BARNARD, P. J.—The city judge of the city of New York, by the act creating his office, was clothed with all the judicial powers vested by law in the recorder of the city (*Laws of 1850*, chap. 205, § 3), and was directed by the same section to perform and discharge all judicial duties imposed

* Present, BARNARD, P. J., and INGRAHAM and SUTHERLAND, JJ.

upon such recorder concurrently with him. The recorder is by statute vested with the power of a Supreme Court commissioner (2 *Rev. Stat.*, 281, 35). As such, he has power to allow a writ of *habeas corpus*, returnable before himself, and to take such proceedings upon a return to the writ, as one authorized by the statute governing the proceedings in such cases, and to adjudge a discharge of the party imprisoned or not, as he shall finally determine (2 *Rev. Stat.*, 280, § 18).

The question presented by the appeal papers is whether the city judge has power to allow a writ of *habeas corpus*. It is claimed under the authority of *Yates v. Lansing* (5 *Johns.*, 282), that the act of allowing such writ is ministerial, and not judicial, and this decision has been followed by this court in *Matter of Nash* (16 *Abb. Pr.*, 281),—and that therefore the city judge had no power to allow the writ, being only possessed of the judicial powers of the recorder.

The case of *Yates v. Lansing* did not arise under the present statutes in relation to *habeas corpus*. As the law then stood, if the chancellor, or judge of the Supreme Court, “in the vacation term,” should “deny to allow any writ of *habeas corpus* by this act required to be granted, being applied for as aforesaid, he shall forfeit to the party grieved one thousand two hundred and fifty dollars” (1 *Rev. Laws of 1813*, 355, § 4). The action was against the chancellor under the fifth section of the same act, for re-imprisonment of a person discharged by the Supreme Court, which imposed an equal penalty for such re-imprisoning. It was held that the chancellor was not liable. That the act for which the action was brought was judicial, and no action would lie for a judicial error in judgment. In giving the opinion of the court, the chief justice does say that “the allowance of the writ in vacation is not a judicial act,” but the question as to the character in which a judge allowed a writ in vacation was not before the court, nor was the same at all involved in the decision of the question which was presented by that case. I think under the present statute, it may well be questioned if the allowance of the writ of *habeas corpus* is a ministerial act. The contents of the petition are prescribed, and the exceptions of those classes of persons given by statute who cannot prosecute it; a copy of the paper under which restraint is made is to be annexed, unless excuse be made for its omission. The officer may determine the question whether he will allow the writ

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or not. That he is made responsible to the party applying, for an erroneous decision, is true. So is the Supreme Court judge, either at chambers or special term. So are all courts or officers who have power to allow the writ, but it seems to me, that the fact of responsibility for error does not determine the character of the act done. It is judicial, if it be the exercise of an authority he possesses as judge, which he may or may not exercise, as he shall determine the action to be legal or not.

It will thus be seen that it is of serious question if the case of *Yates v. Lansing* is authority, for the case of *Matter of Nash*, upon the point whether the act of the allowance of a writ of *habeas corpus* is a ministerial act under the statute as it now stands; but I think the city judge has jurisdiction to allow these writs, whether the allowance of them is ministerial or judicial. He is given the same judicial power as the recorder. After the writ is allowed, and the imprisoned person is brought before the officer, "he is to discharge the bail and remand him as he shall be advised, and no action or penalty is given for what he shall then do or refuse to do" (*Yates v. Lansing*, 5 *Johns.*, 282). The power to hear and determine this matter is judicial. The recorder has this power. If the exercise of a judicial power given by law to the city judge, requires the doing of a necessary ministerial act to initiate such proceeding, he may do such act. The city judge has therefore power to allow the writ; but he may refuse. As it is discretionary with him whether he allows it or not, the remedy is not by mandamus.

The writ of mandamus, when addressed to a judicial officer, or to a court, can only order the officer or court to decide upon the matter before it, but there is no power to direct him how to decide. That rests entirely in the discretion of the court or officer. As the city judge did decide in this case, we cannot direct him to alter his decision.

STRONG *against* STRONG.

*New York, Superior Court; General Term, February, 1865.
Again, May, and June, 1865.*

EVIDENCE.—DISCOVERY AND INSPECTION.—SERIES OF LETTERS.—
SETTLEMENT OF ISSUES IN DIVORCE CASES.

All the parts of a connected correspondence, having relation to the same subject, may undoubtedly become evidence, where one part is introduced; but it is not to be assumed that friendly letters between intimate connections form a series, nor is there any presumption that the subject of such successive letters is the same.

The provision of section 388 of the Code of Procedure—that the court before which an action is pending, or a judge or justice thereof, may in their discretion, and upon due notice, order either party, to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers, and documents, in his possession or under his control, containing evidence relating to the merits of the action or the defence therein,—does not sanction an order requiring either party to disclose evidence which he intends to introduce against his adversary.

In the affidavit or petition for a discovery of books and papers a statement of the advice of counsel and belief of the deponent is not alone sufficient.

In the settlement of issues in a divorce case an issue whether the party was guilty of adultery with a specified person, at any time before the commencement of the action, should not be allowed. Some limits of time and place must be indicated.

But issues actually made in the pleadings, and inserted accordingly, without objection, in the issues as framed for trial, will not be expunged on motion, on the mere ground of indefiniteness as to time and place.

Principles relating to the framing of issues in such cases, stated.

This action was brought to obtain a divorce *a vinculo*, on the ground of alleged adultery of the defendant, and the answer set up the general issue.

I. *February, 1865.* Appeal from an order requiring the plaintiff and his counsel to furnish sworn copies of certain letters within a time certain or debar him from giving their contents in evidence on the trial.

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Subsequent to issue joined, the plaintiff issued a commission to Ohio, and there examined his sister, Mrs. Julia Bedell, who swore in substance that she had received from the respondent in 1863, various letters, containing sundry admissions of the facts charged in the complaint, which she had destroyed, but the contents of which she undertook to state with accuracy; and also two letters which she had preserved and sent to the Hon. MURRAY HOFFMAN, one of the plaintiff's counsel in this case, at his request.

On the petition of the defendant and affidavits of this fact, stating also that she was informed these two letters were in Mr. HOFFMAN's possession, were intended to be used on the trial in evidence against her; that she had no copies of them, but was informed they were similar to those destroyed by Mrs. Bedell, and that in the opinion of her counsel she could not safely proceed to trial without knowing their contents; this motion was made. It was opposed by the plaintiff on his own affidavit, which denied the materiality of the contents of the letters, and stated that the respondent had disobeyed some writ issued by the Supreme Court; and also upon the affidavit of Hon. MURRAY HOFFMAN, which admitted the possession by him of the letters in question. At special term (after argument by *Wm. Curtis Noyes*, for the motion, and *Henry A. Cram*, opposed), the motion was in part granted, the following opinion being rendered.

BARBOUR, J.—As I understand the section of the Code which is relied upon by the moving party here (§ 388), it is not essential that the two letters now in the hands of the plaintiff's counsel may, if produced, be read upon the trial by the defendant. It is sufficient, it appears to me, if they contain evidence relating to the merits of the action which may be read by either of the parties. Those letters appear to me to be a portion of a series of letters written by the defendant to the witness, who has been examined and has testified to the contents of the others which have been destroyed, and it is reasonable to assume that they relate to the same subject matter. If they do, there is no reason why the counsel of the defendant should not be permitted to examine and take copies of them, in order that they may protect themselves against surprise upon the trial,

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which appears to have been one of the objects of the section; if they do not, such inspection cannot harm the plaintiff.

The order must be granted as to the two letters in the possession of the plaintiff's counsel. The letters written by the defendant to J. Cotton Smith, do not appear to be in the hands of the plaintiff or those of his counsel. The order will be settled upon two days' notice.

From the order made upon the foregoing motion, the plaintiff now appealed to the general term.

Henry A. Cram, for the appellant.—I. An order granting a discovery is an appealable order (*Woods v. De Figaniere*, 25 *How. Pr.*, 522).

II. The motion should have been denied, because the petition is not verified by the defendant, and no sufficient excuse is shown for the omission (*Exchange Bank v. Monteath*, 4 *How. Pr.*, 280).

III. The petition itself is insufficient and defective. It does not show that the letters contained evidence relating to the merits that the petitioner could ever use—it showed directly the reverse, that the petitioner could never give the letters in evidence. A discovery for the purpose of the trial has never yet been extended to the papers that the other side alone can use (*Hoyt v. American Exchange Bank*, 1 *Duer*, 652; *Cassard v. Hinman*, 6 *Id.*, 695; *Pegram v. Carson*, 10 *Abb. Pr.*, 340; *S. C.*, 18 *How. Pr.*, 519; *Wilkie v. Moore*, 17 *Id.*, 480; *Morrison v. Sturges*, 26 *Id.*, 177).

IV. On all the papers the motion should have been denied. It appearing from the defendant's papers, that the description of the letters applies to those that were destroyed, and not to those in the possession of the Hon. MURRAY HOFFMAN, there remains no description of them whatever, and no reason of any kind assigned in the papers for their discovery (*Rouse v. Whited*, 25 *N. Y.*, 170).

Elbridge T. Gerry and *John McKeon*, for the respondent.—I. The letters, to obtain copies of which this motion was made, clearly relate to the merits of the action. 1. The ground on which the plaintiff seeks his divorce, is the alleged adultery of the defendant. The answer denied the allegation, and after issue joined, the witness, Mrs. Bedell, was examined to sustain the charges in the complaint. She swore to receiving letters

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from the defendant, which she had destroyed, and the contents of which she undertook to state as showing "confessions" of the acts charged. Two letters she had not destroyed, but handed over to the counsel for her brother, at his request. 2. Obviously these letters are the connecting links in the series, as subsequent letters were received and destroyed by Mrs. Bedell. *Non constat* but that those kept explain the preceding, or nullify the "confessions" she says they contained. 3. The affidavit of the plaintiff as to their relevancy is of no moment. Coming, as it does, from a prejudiced and interested party, and unsupported by the certificate or advice of counsel, its statements are not entitled to any consideration, and should be wholly disregarded. 4. No copies of the letters having been kept, or any memoranda of their contents retained by the defendant, it is necessarily impossible for her to state more fully their relevancy to the issues in the case; and as the plaintiff has not produced them for the inspection of the court, the latter can only judge of their relevancy by applying the maxim *noscitur a sociis*.

II. It is not pretended that the letters were not written by the respondent, that they are not in the possession of the appellant's counsel, or that they are not intended to be used in evidence on the trial—indeed, these facts are admitted expressly in the papers in opposition to the motion. 1. Substantively, then, the concession is, that certain letters have been obtained from a witness by counsel; that they are to be used in evidence; but that because the witness has not shown their technical relevancy to the issue, the defendant is not entitled to copies of them so as to avoid surprise on the trial. 2. The possession, by the plaintiff's counsel, is technically sufficient to warrant the granting of the order appealed from, as he could be compelled to produce them (*People v. Vail*, 2 *Cow.*, 623, affirming *S. C.*, 1 *Id.*, 589).

III. But, under the leading case in this court, the grounds on which the order appealed from was granted were ample to sustain it (*Code*, § 388; *Woods v. De Figanieri*, 25 *How. Pr.*, 522, and cases cited and reviewed by Chief Justice ROBERTSON; *Ferguson v. Hely*, 10 *Irish Jurist* [N. S.], 34; *Kelly v. Eckford*, 5 *Paige*, 548; *Davis v. Dunham*, 13 *How. Pr.*, 425; *Gelston v. Marshall*, 6 *Id.*, 398; *Keeler v. Dusenbury*, 1 *Duer*, 660).

IV. The application, in the first instance, rested in the discretion of the court at special term. Unless there is some substantial error on the face of the papers or order appealed from,

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it is submitted that the court, at general term, will not inquire as to whether the discretion was properly exercised in the first instance (*Code*, § 388).

V. It is very possible that Mrs. Bedell has, through mistake, given a very erroneous view of the supposed contents of the destroyed letters. A cross-examination by new commission, based on these letters, and an exhibition of copies to the witness, might make perfectly manifest the errors in her recollection (*Malin v. Malin*, 1 *Wend.*, 625; *Stone v. Ramsay*, 4 *Monroe* [*Ky.*], 236, 240, 241; *Allen v. Young*, 6 *Id.*, 136; *Snelling v. Utterback*, 1 *Bibb*, 609; *Morris v. Morris*, 2 *Id.*, 311; *Bernard v. Flournoy*, 4 *J. J. Marsh*, 101, per UNDERWOOD, J.; *Myers v. Baker*, *Hardin* [*Ky.*], 549; *Beers v. Broom*, 4 *Conn.*, 247; *S. C.*, 2 *Id.*, 467, *sub nom.* *Beers v. Hawley*, *in point*).

VI.—The order should be affirmed, with costs.

BY THE COURT.*—ROBERTSON, Ch. J.—The order appealed from appears to have been based upon the assumption of a fact, a principle, and a presumption of law, none of which, in my judgment, can be sustained.

The fact assumed is, that the letter in question belonged to a series, which of course implies some connection with each other, whereas nothing of the kind appears anywhere in the papers before us; all the parts of a connected correspondence having relation to the same subject, may undoubtedly become evidence where one is introduced; but no such presumption could arise in regard to friendly letters between intimate connections. In the case of *Ferguson v. Hely* (10 *Jurist*, *N. S.*, 34, February No., 1865), the motion was granted expressly upon the ground that the correspondence was an entirety, and the parts required to be produced contained evidence in favor of the defendant, to show a rescission of the contract sued upon. There is no pretence in this case, except by surmise of counsel, that the letters in question contain anything favorable to the defendant. On the contrary, the suggestion was made that the defendant was entitled to an inspection of them, the better to enable her to explain on the trial any unfavorable statement in them.

The principle of law applied was that the 388th section of

* Present, ROBERTSON, Ch. J., GARVIN and McCUNN, JJ.

the Code did not require that documents, the production of which was sought for under it, must be such as could be read by the applicant on the trial. That section does not require that they shall contain evidence in relation to the matter to be tried, but divides such evidence into that relating to the merits of the action, and that relating to the defence, evidently intending by the former an application by the plaintiff, and in the latter one, by the defendant. If it had been intended that either litigant had a right to know what evidence his adversary intended to introduce against him, such principle would have included the briefs, memoranda of law and facts of counsel, and instructions of their clients, as well as other documents; and indeed, should extend to an oral examination of the parties themselves. The law has always considered sacred the rights of both parties to keep secret their preparations and means of attack and defence, the right of discovery being confined entirely to the evidence in the applicant's favor.

But even if this section (388) were capable of such latitudinarian construction, there is no room for its application in this case; since there is no proof before us that the letters demanded contain any evidence relating to the matters in issue.

And lastly, it was presumed that such letters being part of a *series* as they are called, must have related to the same subject. I know of no principle upon which every friendly letter between the same parties is to be presumed in law to continue to advert to some one subject, or that confessions of guilt on that subject may be supposed to be reiterated, or protestations of innocence inserted in every one; everything is sometime or other brought to an end, and every subject is sometimes absent from our thoughts or writings. Even a friend does not always continue to be confessor, and there is no experience of mankind which warrants the conclusion adopted in this case.

The application was made upon slight grounds: the want of possession of copies of the letters, or recollection of their contents is not sworn to by the defendant, but by a third person alone, and that, too, not on information and belief. How it is possible for one person to testify to the want of such possession and recollection by another, I am at a loss to conceive. It has not the support of even information to that effect by that other, and confidence in it by the recipient. Even the

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residence of the defendant is unknown to her brother, and no communication seems to have passed between them since the examination of Mrs. Bedell. The petition is also vague in not stating how the person verifying it obtained the information that such letters were to be used on the trial, or who has such intention. At all events, the intention would be of little avail, if they were not admissible as evidence.

It is true that the petition states that such letters are, as the defendant is advised by her counsel, material and necessary for the defence of the defendant, which consists of a denial of the allegations of the complaint; but the advice of counsel or belief of a party cannot be substituted for the judgment of the court, upon the facts and circumstances showing the necessity of the productions which are to be spread before it (*McAllister v. Pond*, 15 *How. Pr.*, 299; *Jackling v. Edmonds*, 3 *E. D. Smith*, 539). The court, therefore, not having before them sufficient information of the contents of such letters, to enable it to decide that they would be either prejudicial or beneficial to either party as evidence, ought not to compel their production: as the application becomes thereby entirely a fishing one. The order appealed from should be reversed with costs.

McCUNN, J., dissented.

II. *May*, 1865.—Appeal from a portion of an order made at special term, settling additional issues.

In the month of January, 1864, the plaintiff brought this suit to obtain a divorce from his wife on the ground of her alleged adultery. An answer was interposed denying the adultery, coupled with a plea of forgiveness of any offence complained of. Upon these pleadings, issues of fact to be tried by a jury were framed and settled by the court, the first of which was, "Has the defendant, since her marriage with the plaintiff, committed adultery with Edward N. Strong?" After the cause had been at issue over six months, the defendant moved for leave to file a supplemental answer setting up the plaintiff's adultery with a Mrs. Electa M. Potter. Justice McCUNN granted the motion (29 *How. Pr.*, 432), but struck out certain of the allegations in the

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proposed supplemental answer. In settling the issues arising on the amended pleadings, he refused to allow the following one, and from his order the present appeal was taken.

"Has the plaintiff, since his marriage with the defendant, and before the commencement of this action, committed adultery with one Electa M. Potter?"

Elbridge T. Gerry and *John McKeon*, for the appellant.—I. The issue proposed and rejected was framed with the intent of meeting the first issue framed upon the original pleadings. 1. Such an issue would have been a proper one in the first instance, had the answer been original and not supplemental; the person with whom the adultery was charged being expressly named in the issue proposed, and only the time and place of the adultery being laid as unknown. (a.) In substance, there being a claim for affirmative relief in the supplemental answer, it was equivalent to a cross bill for divorce. (b.) In such a bill the complainant has a legal right to show material acts tending to sustain the charges on which it is based; even if in addition to specific allegations there be an averment of *alia enormita* (*Ingersoll v. Ingersoll*, 1 *Code Rep.*, 102; *Casey v. Casey*, 2 *Barb.*, 59). 2. Such an issue is warranted by precedent (*Forrest v. Forrest*, *printed case in this court, and in the Court of Appeals*, fol. 1797).

II. Nor was the disallowance of the proposed amendment a matter of discretion with the court below, and therefore not properly reviewable on appeal. It affected a substantial right, by depriving the appellant of the opportunity of proving any acts of adultery with Mrs. Potter, the very essence of the answer, save those especially alleged in the supplemental answer. 1. Allowing a defendant to put in a supplemental answer setting up a new defence, which, if established, will be fatal to plaintiff's action, has been held to be a matter of discretion, but such as can be appealed from (*Harrington v. Slade*, 22 *Barb.*, 161). 2. If this be so, all the issues which naturally arise out of the answer ought to be reviewable on appeal, and the order should be so modified with costs.

Henry A. Cram, for the respondent.—I. In making the application to file a supplementary answer, the defendant must state specifically what he wishes to put on the record in order

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that the court may judge how far his application is reasonable (1 *Barb. Ch.*, 166, citing *Curling v. Marquis of Townsend*, 19 *Ves.*, 628).

II. The adultery must be specifically charged with such *certainty* as to time, place and person, that the defendant may be able to meet the fact at the trial; otherwise the court will not award a feigned issue (*Codd v. Codd*, 2 *Johns. Ch.*, 224; *Wood v. Wood*, 2 *Paige*, 109).

III. The name of the person with whom the adultery was committed must be stated, if known. If not known to the complainant, that fact should be averred, and the time, place and circumstances of the adultery should be stated (2 *Barb. Ch.*, 256; *Codd v. Codd*, 2 *Johns. Ch.*, 224; *Wood v. Wood*, 2 *Paige*, 109; *Bokel v. Bokel*, 3 *Edw.*, 376).

BY THE COURT.*—ROBERTSON, CH. J.—The appeal in this case presents the question, whether the learned justice who settled the issues in it, was warranted in refusing to permit an issue whether the plaintiff was guilty of adultery at any time before the commencement of this action, with the person mentioned in the defendant's supplemental answer, to be tried at the same time with the others. It is very evident that the jurors who are to try such issue, could answer such question in the affirmative, without at all agreeing as to the occasion of the offence. No issues ought properly to be tried, except what will affect the decision, and both parties are bound to point out, with reasonable precision, the particular circumstances intended to be established, by time and place, as well as person. The statute as well as all the authorities, requires this (*Codd v. Codd*, 2 *Johns. Ch.*, 224; *Wood v. Wood*, 2 *Paige*, 108; *Bokel v. Bokel*, 3 *Edw.*, 376; 2 *Barb. Ch.*, 256). The other issues in the case are fully as wide as the defendant was entitled to; the twelfth and thirteenth of each issues cover all the time between the 1st of September, 1861, and the 1st of May, 1862, everywhere in the city of New York; the fourteenth covers all the time from the 1st of May, 1864, to the 16th of January last, and the same area of locality. Such issues correspond with the allegations in the answer. There is no allegation in the answer of a commission of the offence named in such rejected issue, with the party therein

* Present, ROBERTSON, CH. J., BARBOUR and McCUNN, JJ.

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named generally, without reference to time or locality. It consequently is not one of the "facts contested in the pleadings" in this action which the statute authorizes to be tried as an issue (2 *Rev. Stat.*, 145).

The order appealed from should be affirmed, with costs.

Order accordingly.

III. *June*, 1865. The defendant then moved at special term to vacate the order settling the issues on the original pleadings, on the ground that those issues were improperly framed within the above decision. The court denied the motion, and the defendant appealed to the general term.

John McKeon, for the appellant.

Henry A. Cram, for the respondent.

BY THE COURT.*—MONCRIEF, J.—There are several reasons why the order should be affirmed. First—A motion to set aside a proceeding for irregularity must be made promptly, and before the moving party takes another step in the cause (*Persse & Brooks Paper Works v. Willet*, 14 *Abb. Pr.*, 119; *Low v. Graydon*, *Id.*, 443; *Lawrence v. Jones*, 15 *Id.*, 110).

There was an interval of eight months between the entry of the order complained of and the motion to set aside. Many steps have been taken on the part of the defendant, and it is said the issues have been upon the day calendar during this period, and reserved ready for trial on her behalf.

Second—There was no irregularity in the order sought to be vacated; the ground suggested did not exist at the time it was entered.

Third. The order appears to have been made after consultation and full deliberation by eminent counsel acting on behalf of the respective parties, and there is no intimation that either gentleman was not as well informed upon the law, practice and forms in such cases, as they could have been, upon reading the opinions delivered at the general term, in May last.

Fourth—The order has been acquiesced in for eight months, and the time to appeal has expired. The court cannot extend the time to appeal (*Code*, § 405).

Fifth—The issues sought to be expunged were made by the

* Present, MONCRIEF, BARBOUR and GARVIN, JJ.

pleadings, and did not require to be settled. Issues of fact arise upon material allegations in the complaint, controverted by the answer (*Code*, § 250).

Sixth—The issue tendered upon the supplemental answer (if correctly set forth in the appeal papers) was properly disallowed, for the reason that the answer contained no such allegation.

Seventh—A complaint is not fatally defective which alleged the commission of the offence "within five years" next before the commencement of the action. This is all the statute requires in that regard (2 *Rev. Stat.*, 145, § 55, subd. 3). The defendant may take issue upon such an averment and proceed to trial, or he may require it to be made more definite and certain (*Code*, § 160). It was the practice in the Court of Chancery to have the charges of adultery made more explicit, at the time a feigned issue was applied for, and the court directed issues to be so framed that neither party could take undue advantage of the other at the trial (*Wood v. Wood*, 2 *Paige*, 108). The Code provides protection quite as liberally (§§ 173, 174, 390, 391; 14 *Abb. Pr.*, 36; 7 *How. Pr.*, 294; 3 *Abb. Pr.*, 36). Assuming a general charge to be true, the delinquent cannot desire to have it made more specific, and if the accusation be false, no amount of critical nicety of variation can be useful to the person wrongfully complained of;—the skill of the advocate must develope the perjury by cross-examination.

Lastly—The grievance alleged on behalf of the defendant is groundless in fact. The complaint tendered the issues, which were settled by the order of the 8th October, 1864. The answer of the defendant did not tender the issue which was disallowed. The defendant, on the 31st January, 1865, did not ask to have all the issues reframed, or any one reformed or expunged, but simply asked for those created by her supplemental answer called "additional" issues. The defendant, feeling herself aggrieved by the refusal to allow a proposed issue, invoked the power of the court by appeal, and was advised by the general term that the order of disallowance was correctly made. If she had had proper ground of complaint against issues framed by herself in October previous, the same tribunal was open to redress error, if any was committed.

The order must be affirmed.

BARBOUR, J., dissented.

THE PEOPLE *against* STRONG.*New York General Sessions ; July, 1865.*

MOTION TO QUASH INDICTMENT.—POWERS OF GRAND JURY.

It seems, that it is only in very clear cases that a prisoner should be allowed to withdraw his plea and move to quash the indictment, without the consent of the prosecuting attorney.

Although, as a general rule, criminal complaints must originate in the police offices, and the court will, on motion, relieve against an indictment if it originated with the grand jury; yet where the interference of that body is necessary to prevent the statute of limitations from attaching, the indictment will not be quashed on that ground.

It makes no difference in such a case that the prosecution might have brought the offence to the knowledge of the authorities at an earlier time.

An indictment should not be quashed upon the ground that there was not sufficient evidence before the grand jury, if there was before them testimony upon which, on their oaths, they could fairly act. If they have some evidence, it is for them to determine its weight.

Of the powers of district attorneys.

Motion to quash an indictment.

The facts of the case, and the grounds of the motion, sufficiently appear in the opinion.

Henry A. Cram, for the motion.

John Graham, for the people, opposed.

RUSSEL, CITY JUDGE.—The defendants, Peter R. Strong and Electa M. Potter, are jointly indicted for manslaughter in the second degree, in killing (as charged) the child with which one Mary E. Strong was quick, by the use of instruments inserted to destroy the foetal life of the child. The indictment contains four counts, diversified to meet the evidence on the trial, and appears to have been drawn with great skill and care.

The defendants pleaded "not guilty" to the indictment, and thus raised an issue to the country. The defendant Strong desiring, through his counsel, to make a motion to quash, or for

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other relief, the district attorney, with his usual fairness and liberality, consented that he might withdraw his plea and make his motion. Without such a consent, he would have had to apply to the court for leave to withdraw his plea and make the motion; which application, under the practice of this court, must have rested upon the strongest grounds, and would by no means have been granted as a matter of course. The liberality of the prosecuting officer serves to show, in answer to the intimations of the counsel for this defendant to the contrary, that he means to pursue the even tenor of his way in this as in other cases, and that he has no other motive for his official conduct than the performance of public duty. The moving papers are quite voluminous, but the substance of them is this:—That Mary E. Strong is the defendant's wife; that he has brought an action for divorce against her, now pending and ready for trial in the Superior Court of this city; that he desires to be tried upon this indictment before that trial takes place; that Mrs. Potter (his co-defendant) is a witness for him on that trial, to repel the charge of adultery brought against him by his wife, in connection with that female; that this is a malicious prosecution against him and his witness, designed to aid the defence of the action for divorce; that his wife's relatives have resorted to it with that view; that he has demanded of the district attorney an immediate trial upon this charge, and that the district attorney has avowed an intention to try Mrs. Potter first, and, should she not be convicted, to use her as State's evidence against him. The district attorney has introduced no affidavit in his own vindication; and very properly, I think. His official oath ought to be regarded as a denial, under oath, of all accusations against him, unless improper conduct is brought home to him by the plainest facts; nothing of the kind appears here. The counsel who argued against the present motion on the part of the people, offered the following matters of fact in opposition to the moving papers:—First, That the district attorney had endeavored to bring on the trial of Mrs. Potter, but that it had been postponed by the court, notwithstanding his resistance, for reasons satisfying the practice of the court; and secondly, That this indictment did not stand in the way of the defendant's trying his action for a divorce, as he himself considered, for that, since his present motion was noticed, his counsel had made a vigorous effort to force on that trial.

If the district attorney had determined to try Mrs. Potter

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first, he certainly has been guilty of no delay towards the defendant Strong in that particular. It may be said to be conceded that the blame is not his, that she has not been tried; for the facts relied upon by the prosecution, as to that branch of the matter, are not contradicted on this motion.

The present application has two aspects; First, as a motion to quash the indictment; Second, should that relief be denied, as a motion to the court to control the public prosecutor as to the time of trying the indictment as against the defendant Strong. The motion to quash is urged upon two grounds: First, that the indictment was found without a previous complaint in the police office; Second, that there was not sufficient evidence before the grand jury to warrant it.

As to the first of the grounds of the motion to quash (which has been submitted as a supplemental point in writing by the defendant's counsel, and was not distinctly taken upon the argument), this court, so far as I am concerned,—for I do not understand that my associate in this court concurs with me in my judgments as to the power of the court over, and its duty to impose proper restraints upon, grand juries,—has decided that criminal complaints ought properly to originate in the police offices; and that where they originate with the grand jury, as a general thing, relief will be granted against the indictment upon motion—unless where the interference of that body is requisite to prevent the statute of limitations attaching, or where the accused resides out of the State, and a requisition from the governor has to be issued to bring him within the jurisdiction of our courts. From the facts testified to before the grand jury by the midwife in this case, the present offense (if it ever was committed) must have been committed before or on March 5th, 1862; and from the fact of the grand jury finding the indictment with such deliberation and apparent reluctance (for it was under consideration three times before a bill was ordered, as the moving papers show), it is evident that it would not have been proper to have postponed the submission of the matter to the indicting body longer than the last February term of this court, even though there might have been some days left in the March term, during which the grand jury for that term could have acted upon the complaint. Had this matter been reserved for the grand jury of the last March term of this court, however, the statute of limitations must have barred it altogether; for

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that commenced on Monday, March 6th, 1865, and, allowing for a delay of several days in impannelling a grand jury (which is very frequently the case), the three years within which the indictment must have been found, if at all, would have been exceeded several days. In speaking of three years from March 6th, 1862, as the period within which the indictment would have to be found, it is assumed (for the moving papers state nothing to the contrary) that the defendant, Strong, has, all that time, been usually resident in this State. Our statute requires all indictments (unless in cases of murder) to be found and filed in the proper court within three years after the commission of the offense, but the time during which the defendant shall not have been an inhabitant of, or usually resident within, this State, forms no part of the limitation of three years (3 *Rev. Stat.*, 5th ed., 1017, § 37). Even if there had been a few days of the March term of the court left for the action of the grand jury upon the present complaint, the defendant, had he been indicted under those circumstances, might well have complained that the matter was offered to that body at so late a day as to deprive them of the opportunity for deliberation. Under the present circumstances, the complaint was submitted to the indicting body as late as it should have been. Should it be said that it was the fault of the prosecution that the alleged offense was not brought to the knowledge of the authorities sooner—the answer to that is, that an offense is public property, and that the law has prescribed the time for which the right to prosecute it shall remain. Delay in bringing it forward is a strong discrediting circumstance against the verity of the charge, and a very proper subject for the grand jury to be satisfied upon before they indict. No doubt, in this instance, the indicting body weighed this circumstance, and the scruples it occasioned in their minds may have caused the embarrassment or reluctance which seems (from the moving papers) to have characterized their action, and induced them to make a demand twice for additional evidence.

In relation to the second ground of the motion to quash, that there was not sufficient evidence before the grand jury to warrant the indictment, the court has no doubt it should be overruled. In saying that, I do not mean to intimate that there was sufficient evidence before that body, unexplained and uncontradicted, to justify the defendant's convictions, or to express any

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judgment upon the strength of the evidence. There was testimony before that body going to the whole case, bearing upon every essential part of the charge, and under the constitution and laws of this State, under their oaths, its members were to pass upon the weight and effect of that testimony. The reasoning of the counsel for the prosecution upon this point is, to my mind, irresistible and unanswerable. To discipline the grand jury is one thing. To keep them within their constitutional and lawful limits is the duty and right of the court; but when they have testimony before them upon which their oaths can fairly act, to tell them how much testimony they must have upon a given point, or what result they shall declare from testimony before them, would be (to use the language of the counsel for the prosecution) to obliterate or wipe them out as a separate and independent judicial institution. Such a doctrine as is contended for in favor of this motion, in effect would make this court both the indicting and trying body. It is unnecessary to refer to the authorities which I have examined in coming to this conclusion. Since I have been upon the bench of this court, many motions of this description have been made and argued before me, and I have uniformly granted relief against the action of the indicting body where it has been unlawful or oppressive, or where the ends of justice would be prevented by allowing it to stand. The principle of these decisions did not affect the separate existence or independence of that body, when acting in the discharge of their legitimate duties. To say to that body that it must have competent lawful testimony before it indicts, or that it must not interfere with a complaint undergoing examination in a police office, or that the requisite number must be present when a bill is ordered, or that the statutory number must concur in finding a bill, otherwise its presentment will be set aside, is very different from saying to it, where it has evidence before it reaching the whole case, the legality or competency of which is not denied, that it had no right to believe a certain witness, or that it ought to have demanded more testimony on a given point, and, hence, that its finding shall be vacated. The former class of decisions merely announces to the indicting body, that whenever the law has given it a rule of action, the law must be observed. The latter class would dictate to it how it shall redeem its oath in a matter appertaining to the consciences of its members. The only authority cited upon

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the argument to which my attention had not been called on previous occasions of this kind, was *The United States v. Reed*, (2 *Blatchf.*, 435), which appears to sustain fully my conclusion.

The principal authorities bearing upon the right or duty of the court, over or in reference to grand juries, were reviewed by me in an opinion filed in this court at the June term, 1864, in *The People v. Dederick* and others, where the counsel, who argued against the present motion on the part of the prosecution, argued a motion to quash an indictment, which was granted upon grounds involving a very full consideration of the law on this subject. The learned counsel for the defendant has, since the argument, referred me to a manuscript report of a case in the Court of General Sessions of Dutchess county—*The People v. Levy*—in which the opinion was pronounced by WHEATON, County Judge, upon a motion to quash for want of proof before the grand jury, of the *corpus delicti*. The decision granting the motion was merely an adoption of the principle of *The People v. Restenblatt* (1 *Abb. Pr.*, 268), which holds that the grand jury cannot indict without having some evidence to show the commission of an offense. That principle does not touch the present application, for here the grand jury had some evidence as to the commission of the offense, and under their oaths they were to judge of its weight and effect. In reference to the other branch of the present application to the court—to control the district attorney as to the time of trying the indictment against the defendant Strong—there can be no doubt of the power of the court to interfere, in a proper case, for the protection of the rights of the accused.

In *The People v. McIntyre* (1 *Park. Cr.*, 371), the court say: "It was a matter addressed to the sound discretion of the court below, whether they would interfere with the order of trial of the persons indicted. The statute secures to persons jointly indicted for a felony, the right of separate trials, but does not give to them the right to regulate the time or order of such trials. The public prosecutor controls and directs on these matters, subject to the directions of the court in cases calling for interference. It cannot be assumed by any court, and certainly not by a court of review, that the grand jury have found an indictment without sufficient evidence or from improper motives, or that the public prosecutor has unworthily procured an indictment against an innocent individual, and delays the trial in or-

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der to deprive another person indicted for the same offense of the benefit of his testimony. If a case of that kind should be brought to the knowledge of the court, it cannot be doubted that measures would be taken to secure to the persons indicted their just rights and fair trials."

In that case (which was a charge of felony) the defendants demanded separate trials, and a motion was made in the court below that the court direct the district attorney to try the co-defendant of the party, in whose behalf the motion was made, first, which was refused. The duties of the district attorney's office are sufficiently responsible and onerous without being perplexed by any unwarrantable interference from any quarter. In this county his office is one of very great trust, and it never has been filled by a gentleman more faithful to all its requirements than its present incumbent. Nothing appears to justify the court in questioning his motives or conduct in any manner, or in withdrawing from him his acknowledged rights over all criminal prosecutions. There is nothing unusual in his course or management, as exhibited by the moving papers; and, had the learned counsel been more familiar with the powers, duties and usages of that office, than he claimed to be in his argument, he no doubt would have been restrained from the reflections upon the prosecuting officer in which he indulged.

The motion is denied in both aspects of it, and upon all the grounds upon which it was urged, and the clerk will enter an order to that effect.

WILCOX *against* LEE.

New York Superior Court; General Term, November, 1863.

FORMER ADJUDICATION.

A judgment in favor of the defendants, in an action to recover the price of goods sold, which proceeded upon the ground that they were sold on a credit which had not expired when the action was brought, is not a bar to a second action brought after the credit has expired.

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Where such judgment does not affirmatively disclose the ground upon which it proceeded, but there was uncontradicted proof of such unexpired credit, and the existence of such credit was the only question argued on submitting the case, it will be inferred that the judgment proceeded solely on that ground, although evidence in support of another defence was given on the trial.

This was a motion by the defendants for a new trial, on exceptions taken at the trial, and there ordered to be heard at general term in the first instance.

The action was brought by Horatio R. Wilcox and Joshua Draper, for goods sold and delivered in March, 1861, to a firm composed of the defendants and one George A. Dunlap, at the agreed price of four hundred and fifty dollars, on eight months' credit. The defendants were Uriah M. Lee, Charles P. H. Ripley, and Charles M. Hoyt. The defendants Ripley and Hoyt, in their answer, set up a former trial in the Marine Court, in July, 1861, for the same cause of action, in a suit by these plaintiffs against these defendants and said Dunlap, and allege in their answer that "judgment therein was rendered in favor of the defendants, *on a question of fact*, on the 24th of July, 1861. The sale and delivery of the goods in March, 1861, to the defendants at the agreed price of four hundred and fifty dollars, on a credit of eight months, was fully proved on the present trial. The defendants then proved that in July, 1861, these plaintiffs sued these defendants and Dunlap in the Marine Court, and in their complaint claimed to recover for goods sold and delivered to such defendants in March, 1861, at the agreed price of four hundred and fifty dollars. The complaint in that action did not state whether the goods were or were not sold on a credit, but it alleged that the four hundred and fifty dollars was due, with interest from April 1, 1861, and prayed judgment accordingly.

The answer of Ripley and Hoyt in that suit denied each and every allegation in the complaint.

It was proved on the trial of this action that, on the trial in the Marine Court, evidence was given of the sale and delivery of the goods, and that they were sold on a credit of eight months. *George B. Bonta*, the person who made the sale, was asked, with reference to his testimony on the former trial, thus: "Q. Did you not testify that the sale was a cash sale,

"and you applied to them for a note, according to the custom of that kind of sale ?

"A. I asked for a note ; it was not given ; it was then considered a cash sale, according to the custom of merchants."

It was also proved that a question raised and argued in the Marine Court was, whether the goods were sold on a credit of eight months, and that this was the only question argued on submitting the case.

The judge who tried the cause, testified that he did not recollect on what ground he decided it, "whether on the ground of unexpired credit, or on the ground that the sale was made by Bonta individually. The defendants sought to prove that *Bonta* sold the goods in his own name, and on his own account. No judgment was entered in the docket in the Marine Court, but there was indorsed on the summons and complaint, in the handwriting of the judge, the words—"Judgment for defendants, with costs and ten dollars allowance." On the present trial, the judge ordered a verdict for the plaintiffs for four hundred and eighty-one dollars and fifty cents, the amount of the goods and interest ; and the defendants excepted to the decision.

L. S. Chatfield, for defendants.—I. The former trial and decision was a full and complete bar to this action. The parties were the same, the pleadings the same, the cause of action the same, the evidence the same ; and the cause was finally submitted on the merits, and decided by the court (*McGuinty v. Herrick*, 5 *Wend.*, 244 ; *Bockway v. Kinney*, 2 *Johns.*, 210 ; *Rice v. King*, 7 *Johns.*, 20 ; *Thomas v. Rumsey*, 6 *Johns.*, 26 ; *Johnson v. Smith*, 8 *Johns.*, 383 ; *Platner v. Best*, 11 *Johns.*, 530 ; 15 *Johns.*, 432 ; *Phillips v. Berick*, 16 *Johns.*, 136 ; *Gardner v. Buckbee*, 3 *Cow.*, 120 ; *Coles v. Carter*, 6 *Cow.*, 691 ; *Morgan v. Plumb*, 9 *Wend.*, 287).

II. The *record* was conclusive, and could not be varied by parole. The record of the former trial was complete, and established a sufficient bar (*Sutton v. Dillaye*, 3 *Barb.*, 529 ; *Noyes v. Butler*, 6 *Barb.*, 613 ; *Foster v. Trull*, 12 *Johns.*, 456 ; *Brush v. Taggart*, 7 *Johns.*, 19).

III. There is no force in the objection that the judgment was not docketed. If the cause is finally *submitted* to the court it is enough, whether it is *decided* or not—but here it

was decided (*Felter v. Mulliner*, 2 *Johns.*, 181; *Burt v. Stemburgh*, 4 *Cow.*, 559).

IV. The grounds of decision were not inquirable into. The cause was submitted on the merits, and it is not material on what ground the judge decided. The judgment, as entered, was, "judgment for defendants, with costs, and ten dollars allowance," and was not a non-suit or dismissal.

V. The action could not be maintained against these defendants. Hoyt was not a member of the firm when the goods were sold, and no notice of dissolution to Wilcox and Draper, was necessary.

Gilbert Dean, for plaintiffs.—I. Where a former judgment is set up as a defence, parole evidence is admissible to show what was actually in controversy between the parties, and the grounds upon which the judgment was rendered (*Doty v. Brown*, 4 *N. Y.* [4 *Comst.*], 71; 8 *Wend.*, 9; 4 *Barb.*, 457; 36 *Barb.*, 95).

II. The decision of the Marine Court, ordering judgment for defendants, was therefore merely a judgment of non-suit, and no bar to this action.

III. The judge who tried this cause properly ordered judgment for plaintiffs, as there was no disputed question of fact. But if there were, the defendant should have specifically excepted, or requested him to submit the question to the jury.

BY THE COURT.—BOSWORTH, CH. J.—The defendants have had the goods for which the verdict was ordered, and have not paid for them. The question now is, whether the former trial and judgment are a bar to a recovery in this action. It is quite clear that on the trial in the Marine Court, as in this, the evidence of the sale of the goods, at the agreed price of four hundred and fifty dollars, on a credit of eight months, was uncontradicted. The evidence on this trial shows that, in the suit in the Marine Court, Bonta testified that he sold the goods as agent of the plaintiff, and so informed the defendants at the time of the sale. It does not appear that there was any attempt to contradict him, and no evidence in conflict with such being the facts was given on this trial.

The case comes, therefore, to this point. Judgment was given for the defendants in the Marine Court, on uncontradicted proof

that the sale was on a credit of eight months, which had not elapsed. It cannot be conjectured that it proceeded on any other ground or fact. On what ground, or fact found, the judge decided it, he does not recollect, and I lay his testimony out of view. But it does appear that the only question discussed before him on the close of the evidence was, whether the credit had expired. I think it should be inferred that this was the only question of fact which he determined adversely to the plaintiffs, and finding that it had not, and it being his duty to so find, he gave judgment for the defendants on that ground, and for that cause.

If this be the correct view, then it is clear that it was not determined in the Marine Court, that the plaintiffs did not sell and deliver the goods at the agreed price of four hundred and fifty dollars.

If it had affirmatively appeared on the present trial, that the judgment in the Marine Court was given expressly on the ground that the suit was prematurely brought, then *Quackenbush v. Ehle* (5 *Barb.*, 469-472) would be an authority that the former trial and judgment was not a bar. In the present case, the contrary does not appear, either by the record or the proofs; and presumptively, the first judgment could not have proceeded on any other grounds.

Quackenbush v. Ehle is not in conflict with *Morgan v. Plum* (9 *Wend.*, 287-317). In the latter case, the plaintiff was entitled to recover upon the evidence given. But judgment was given against him, contrary to the law and the evidence. His remedy was a review on a case or exceptions; and not by another suit on the same evidence.

It cannot be affirmed, or established inferentially, that the judgment in the Marine Court determined any fact, except the fact that that suit was brought before the agreed term of credit had expired. As it does not appear that any other fact was determined, and as that fact was undisputed, and entitled the defendants to judgment, and as presumptively no other fact could have been determined in their favor, I think the former suit and judgment do not bar this action.

The facts that the plaintiffs sold the goods to the defendants at the agreed price of four hundred and fifty dollars, and that the defendants have not paid any part thereof, have not been passed upon and decided against the plaintiffs. But a fact con-

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sistent with them, and found on the first trial by uncontradicted evidence, viz.: that the goods were sold on a credit of eight months, was found in the Marine Court, and having been found, the defendants had judgment.

Holding that such a judgment is not a bar to this action, does not conflict with the rule that "a fact which has once been directly decided shall not be again disputed between the same parties;" nor with the rule that "the judgment of a court of concurrent jurisdiction directly on the point, is a plea or bar, and as evidence, conclusive between the same parties upon the same matter directly in question in another court" (*Jackson v. Wood*, 8 *Wend.*, 9; *Doty v. Brown*, 4 *N. Y.* [4 *Comst.*], 71).

I think the motion for a new trial should be denied, and judgment for plaintiffs on the verdict, ordered.

MANICE *against* GOULD.

Supreme Court, First District; Special Term, February, 1866.

ATTACHMENT.—APPEARANCE.

Defendant may move to set aside an attachment against his property without putting in a general appearance in the action.

Motion to discharge an attachment.

The plaintiffs, William D. F. Manice and Benjamin C. Wetmore, sued as executors, and upon an affidavit that the defendant, Mary E. Gould, was a non-resident, having property within the State, obtained an attachment against her property.

She now moved to set aside the attachment, upon the original papers on which it was obtained. She did not appear generally, in the action, but only for the purposes of the motion.

Brown, Hall & Vanderpoel, for the plaintiffs, objected that defendant could not move till after she had appeared in the action.

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Flamen B. Candler and Edgar S. Van Winkle, for the motion.—I. The defendant may, after appearance, move to discharge the attachment (§ 240), but he *may in all cases* move to discharge it, *as in* the case of other provisional remedies (§ 241). The larger license controls the smaller. Since a non-resident cannot appear in person, he can through an attorney act in those cases where personally he could without an appearance move to discharge any process.

When it is intended to remove a suit from a State court into the United States courts on account of jurisdiction, a special or modified appearance is allowed (*Field v. Blair*, 1 *Code R.* [*N. S.*], 292, 361; *Durand v. Holland*, 3 *Duer*, 686).

And this because, otherwise, as a voluntary appearance would be a waiver of objection to the jurisdiction, the steps taken to protect his rights would forfeit them.

A voluntary and general appearance, besides being equivalent to a personal service of the summons (*Code*, § 139) is a waiver of all defects in the summons as previous proceedings (*Webb v. Mott*, 6 *How. Pr.*, 439, and other cases cited under § 139 in *Voorhies' Code*).

If, in case of an unauthorized attachment against a non-resident, the defendant must put in a general appearance before he can move to discharge it, the consequence is, that the plaintiff by his wrongful act compels the defendant to give the court jurisdiction and control of the subsequent proceedings, for the court has such jurisdiction and control from the time of the service of the summons, and a voluntary appearance is equivalent to personal service of the summons.

The effect will be that although the attachment may be set aside, the plaintiff can go on and obtain a judgment which he is not entitled to; for in cases of service of summons by publication he can only take judgment against a non-appearing defendant, for the property originally attached, and if in this case he has no right to an attachment he could have no judgment at all, except through the appearance of the defendant wrongfully obtained.

A party can move *ex parte* to discharge an arrest, or to vacate an injunction, or to reduce bail: arrest, attachment, claim and delivery are all provisional remedies (*Code*, title VII, part 2).

May not an attorney appear as *amicus curiæ*?

As in case of other provisional remedies (§ 241), a defendant may at any time before judgment apply on motion to vacate the order of arrest, or to reduce the amount (§ 206).

If application to vacate the order of arrest be made to the judge who granted the order, it may be made *ex parte* (Cayuga Bank v. Warfield, 13 *How. Pr.*, 439, also to vacate an injunction (Bruce v. Del. & H. C. Co., 8 *How. Pr.*, 440; Rogers v. McElhone, 12 *Abb. Pr.*, 292; 20 *How. Pr.*, 441; Dickinson v. Benham, 12 *Abb. Pr.*, 158).

II. No attachment can issue against a non-resident, except in an action for the recovery of money (*Code*, § 227; Shaffer v. Mason, 18 *Abb. Pr.*, 455. See also Gordon v. Gaffey, 11 *Abb. Pr.*, 1; Wallace v. Hitchcock, 18 *Abb. Pr.*, 291, *note*; Knox v. Mason, 18 *Abb. Pr.*, 290; Kerr v. Mount, 28 *N. Y.*, 664; Ackroyd v. Ackroyd, 11 *Abb. Pr.*, 345).

III. Where, as in this case, the motion is founded solely upon the weakness, or insufficiency of the case made by the plaintiffs on their application to the judge for the warrant, the attachment must stand or fall upon the facts originally presented to the judge upon such application, and no new or further affidavits can be introduced (Hill v. Bond, 22 *How. Pr.*, 272; St. Armant v. De Beixcedon, 3 *Sandf. S. Ct.*, 703; Morgan v. Avery, 2 *Code R.*, 92, 121).

If the affidavit is insufficient, the attachment must be set aside (Dickinson v. Benham, 19 *How. Pr.*, 410; S. C., 12 *Abb. Pr.*, 158; affirmed 18 *Abb. Pr.*, 455; Brewer v. Tucker, 13 *Abb. Pr.*, 76).

IV. The affidavit is insufficient in this, that it does not appear thereby that a cause of action exists against the defendant. It is only stated therein that the plaintiffs, as *executors*, have a cause of action against the defendant, and does not state that the will has been proved before, or letters testamentary issued to plaintiffs, by a surrogate or other officer *within this State*, authorized to take such proof, or issue such letters (Sheldon v. Hoy, 11 *How. Pr.*, 11. See Wheeler v. Dakin, 12 *Id.*, 537; Bangs v. McIntosh, 23 *Barb.*, 591; Gillet v. Fairchild, 4 *Den.*, 80; White v. Low, 7 *Barb.*, 204).

V. The affidavit does not present legal proof, to wit, *facts*; but only a conclusion of law.

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CLERKE, J.—I agree with the counsel of the defendant, that the provision in section 241 dispenses with the requirement in section 240.

Motion to discharge attachment granted, without costs.

MOSHER *against* HEYDRICH.

Supreme Court, Second District; Special Term, September, 1865.

CONFESSION OF JUDGMENT.—SIGNATURE.

The party's subscription to the affidavit added to his statement for judgment by confession, is a sufficient signing of the statement, within the provision of section 382 of the Code of Procedure which requires the statement to be "signed by the defendant, and verified by his oath."*

A verification in terms that "the facts stated in the above confession are true," is sufficient.†

A notary public, in certifying an affidavit need not add the place of his residence thereto, to show that the venue was within his jurisdiction.

The statute giving notaries power to certify affidavits, is not to be construed as restricted to affidavits in actions pending.

A judgment upon confession may be entered in any county, without restriction to the county in which the statement was verified.

Motion to set aside a judgment. The facts sufficiently appear in the opinion.

William Henry Arnoux, for the motion.

Hughes & Northrup, opposed.

LORR, J.—After a careful examination and consideration of the argument presented in the able and elaborate brief of the counsel of the applicant, and urged on the hearing of the

* As to the necessity of signing an affidavit see *Soule v. Chase*, *Ante*, 48, and cases there cited.

† To similar effect is *Whelpley v. Van Epps*, 9 *Paige*, 332

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motion, I am unable to sustain him in any of the grounds on which he asks to set aside the judgment of Mosher for irregularity.

The first assigned is that the statement was not signed by the defendant. This objection is decided against him in the cases of *Post v. Coleman* (9 *How. Pr.*, 64); and *Purdy v. Upton* (10 *How. Pr.*, 494), and I see no reason for departing from those decisions. The case of *Hathaway v. Scott* (11 *Paige*, 173), cited by him is not in conflict with either of them. There the name of the petitioner was not signed to the petition, nor to an affidavit verifying it. It appears from the chancellor's opinion, and the statement of facts preceding it, that the only evidence of the verification was the certificate of the officer who administered the oath subjoined to the petition, and in such case the chancellor says the name of deponent should be subscribed to the petition, but he also says that "when the verification of a bill or petition is in the form of an affidavit, the name of the defendant must be subscribed at the foot of the affidavit." That case is an authority in support of, rather than in conflict with the first mentioned decisions. The affidavit in the case before us is substantially an allegation forming a part of the statement preceding it, stating that the matters before stated are true, and being signed by the party making it, is a sufficient compliance with the requirements of the Code in that respect.

The second ground of objection is that the statement was not duly verified by the oath of the defendant, and it is insisted that the allegation in the affidavit, "that the facts stated in the above confession are true," is not a verification of the statements made therein. The counsel says that a party might as well say "that the lies are false. It is an axiom that nobody can dispute, the facts must be true." I do not construe the terms as he does. The affidavit must be construed in connection with what precedes it. The confession contains several statements of different matters, not merely those out of which the indebtedness arose, but the further facts that he made the confession of the debt, and authorized the entry of the judgment therefor, and when it is said that the facts stated in the above confession are true it is in effect that the statement is true. The Code authorizing the confession provides that the statement shall, among other things, state concisely the

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facts constituting the debt or liability, and evidently in the use of that word refers to the matters and circumstances on which such debt or liability is founded, and does not admit of the narrow construction put on it by the counsel. In the case of *Fitzhugh v. Truax* (1 *Hill*, 644), cited by the counsel, the words used in the affidavit of the merits were "that he has fully and fairly stated the facts of *his* case," and not as stated by him, "the facts of the case" instead of "the case," showing that only on one side of the controversy had he been advised by counsel.

The third ground of objection is that the verification was not made before an officer of competent jurisdiction. The affidavit appears to have been made before a notary public, in May, 1865, and the venue is the city and county of New York, and it is insisted by counsel that it was necessary for him to add to his name his place of residence, so as to show his jurisdiction to act. By chapter 508 of the laws of 1863, notaries public were authorized to take affidavits and certify the same in all cases where justices of the peace or commissioners of deeds might, at the time of passage of the Act, take and certify the same. Assuming that said affidavit should only be taken in the county where the notary resided, or in which he was appointed, there is nothing to show that it was taken out of his jurisdiction; the presumption is that he acted where the venue of the affidavit is laid, and that he resided there. It is conceded by the counsel that such a presumption arises in reference to a commissioner of deeds, without adding to his signature his place of residence, because, he says, that beyond his county he ceases to exist; but he contends that the case is different with a notary, who, it is claimed, is a State officer, and, therefore, when he attempts to act as a commissioner, his right must affirmatively appear by adding after his name of office that he resides in the city of New York, or words equivalent thereto. I am unable to appreciate the force of the distinction. It would seem to be a sufficient answer to the position contended for, that the notary, in taking an affidavit, does not attempt to act as a commissioner; he acts by virtue of his appointment, and may take affidavits in all cases where commissioners of deeds could take the same at the time of the passage of the Act referred to, and if he is a State officer it is by no means clear that he cannot in every part of the State (see 1

Rev. Stat., 112, 314); but if, in the discharge of that new power he can only exercise it within the place of his residence or appointment, he in that case stands in the same position as a commissioner of deeds, or a justice of the peace, and I see no more reason for the designation of his residence in addition to his name in his case than that of the commissioner or justice. He, as well as those officers, are, then, officers of like and equal jurisdiction, and, alike limited as to the locality in which their power can be exercised, and the presumption attaches alike to each of them that he is an officer acting within his proper jurisdiction, and that the place of such jurisdiction is indicated by the venue. I may add that the objection growing out of the want of designation of the place of the notary's jurisdiction is not stated with sufficient certainty as a ground of irregularity to be available as such. If it had been distinctly stated it might have been shown where he acted and that he had authority to act where he did. It is competent to show such authority in support of a proceeding where it is assailed.

The last ground of objection is that the clerk of the county of Kings had no jurisdiction to enter the judgment. Assuming that the title of the confession referring to the court and the names of the parties is, as contended for, a nullity, I see no reason why the judgment or the confession could not be entered up in Kings county.

Affidavits taken before certain officers (including now notaries public) when required or authorized by law in any cause, matter, or proceeding (except in certain cases not applicable to the present), and certified by such officer, may be read before any officer, judicial, executive, or administrative, before whom any such cause, matter, or proceeding may be pending (see 2 *Rev. Stat.*, 284, § 49). The provision does not limit the use of them (as would seem to the argument of counsel) "to actions pending," but is sufficiently broad to extend to all cases (except to those above referred to) where affidavits are required to be used in courts or before officers of the classes designated.

The clerk of a county is classed among the judicial officers in the classification of civil officers (1 *Rev. Stat.*, 96). The affidavit in question might therefore be used before any county clerk, and under sec. 384 of the Code the judgment might be entered with any county clerk and not merely in the county where the statement authorizing it was verified.

There is, therefore, no ground for the last objection.

I have thus gone over and considered all the objections urged against the judgment in question, in deference to the zeal and apparent confidence in them of the counsel, as well as the importance of some of the positions taken.

The result is that none of them are well founded, and the motion must be denied with ten dollars costs, to be paid by the party on whose behalf it is made.

PATTERSON *against* PATTERSON.

New York Superior Court; General Term, October, 1863.

PLEADING.—VARIANCE.—APPEAL.

A complaint seeking to set aside conveyances and other instruments affecting real property, on the ground that they were obtained by fraud, is not sustained by proof that they constitute a mortgage from which the plaintiff has a right to redeem. This is not a mere variance, but a failure to prove the cause of action in its entire scope and meaning.

If this objection be taken, on a motion, at the trial before a referee, to dismiss the complaint upon the plaintiff's evidence, it is available on appeal from a judgment for the plaintiff upon the referee's report in his favor, although no exceptions were taken to the report upon the ground that the cause of action as found was not that set forth in the complaint.

Appeal by the defendant from a judgment in the plaintiff's favor, entered upon the report of MURRAY HOFFMAN, Esq., referee, before whom the issues in the action were tried.

The complaint alleged, in substance, that on the 9th of November, 1853, the plaintiff, William, was seized of the legal title, and was owner and in possession of premises in the city of New York, known as 313, 315 and 317 Bleecker street. That his son, the defendant, William G. Patterson, to whom, by reason of his own ill health, the management of his business had been intrusted, fraudulently procured the premises to be sold by the sheriff upon a judgment for costs against the plaintiff, in a suit

instigated by the son for that purpose, and that the son bought another judgment against him (recovered by one Newall), and also fraudulently induced him to confess a judgment to him, the son, upon both of which the son redeemed the premises from the sheriff's sale, and subsequently, also fraudulently, induced him to give a quit-claim deed of the premises, upon a promise to re-convey them; and that he incumbered the title, and refused to re-convey. The prayer for relief was that the defendant re-convey; that the plaintiff be declared the true owner; that an accounting be had; and that a certain mortgage described in the complaint be declared a lien on the adjoining premises belonging to the defendant, &c., and for an injunction pending the action, and for costs.

The answer admitted the making of the conveyances, &c., but denied the fraud, and also alleged, as a third defence, that defendant being the owner of adjoining premises, Nos. 319 and 321 Bleeker street, and relying on the title he had acquired to the premises now claimed by the plaintiff, had erected, with the knowledge and assent of the plaintiff, buildings partly on both premises, and that they could not be removed, and would be useless to defendant without the land in question.

The particulars of the evidence given upon the trial, which was very conflicting, are sufficiently indicated in the opinion of the court.

After the plaintiff rested, the defendant moved to dismiss the complaint on the grounds:

1. That no cause of action had been proved.
2. That the facts proved would not alone entitle plaintiff to recover anything.
3. That the cause of action alleged in the complaint was unproved in its entire scope and meaning.

The referee denied the motion, and the defendant excepted.

After the defendant had rested, and the case was closed, and the referee had made a decision holding the defendant to be a mortgagee in possession, on the plaintiff's motion, testimony was allowed to be adduced as to the respective and relative values of the property in question, and the adjoining property of the defendant. At the close of such testimony, the defendant offered to prove that he received no part of the rents of the buildings Nos. 313, 315 and 317, intermediate June, 1861, and May, 1862. during which time he paid all outgoings in respect of the prem-

ises, and that the rents during that period were received by the plaintiff and appropriated to his own use: he also offered to prove that for long prior to June, 1861, he did not receive rents enough from said premises Nos. 313, 315 and 317 to satisfy the actual necessary outgoings in respect of said premises.

The case being closed except as to the values, the referee refused to admit this testimony, and to his refusal the defendant excepted.

Defendant also offered to prove by the defendant and also by the plaintiff, that neither party intended by the several transactions between them, by any or either of them to create the relation of mortgagor and mortgagee.

The referee refused to admit this testimony, and to his refusal the defendant excepted.

The plaintiff being re-called in his own behalf, the defendant's counsel asked;—if, when he gave the quit-claim deed to his son, he intended it as a mortgage? also, was it not in order that he should hold the property in trust? These questions were both excluded upon objection, and the defendant excepted.

The referee, in the written opinion accompanying his report, stated that it was not often that he had, upon evidence, a more uncertain case to deal with: that he thought, after much consideration, that the conclusion best warranted was, that the relation of mortgagor and mortgagee in substance was the original true relation of the parties to each other; that the property was taken and held as security for the advances made by the defendant, and upon that basis the rights and claims of each were to be adjusted and determined.

As conclusions of law, he found, by his report, that the plaintiff was entitled to a judgment, directing the defendant to convey and release to him the premises, now known as Nos. 313, 315 and 317 Bleeker street: upon his delivering to such defendant, a full and sufficient release, and discharge of the adjoining premises, from the lien of the mortgage specified, and also upon paying to the defendant the sum of \$1,134¹⁵/₁₀₀ being the difference between the sum he had found due to the defendant from the plaintiff, and the proportion of such mortgage, which the defendant ought to bear.

And that the plaintiff release and convey to the defendant all that part of the property mentioned in the sheriff's deed, and

not comprised within the boundaries of the parcels, Nos. 313, 315 and 317 Bleecker street.

Judgment having been entered accordingly, the defendant now appealed.

John Townshend, for defendant, appellant.—I. There was a failure of proof, and the complaint ought to have been dismissed for that cause on the defendant's motion (*Salters v. Genin*, 3 *Bosw.*, 250; *Walter v. Bennett*, 16 *N. Y.*, 250; *Stearns v. Tappin*, 5 *Duer*, 294; *Kelsey v. Western*, 2 *N. Y.* [2 *Comst.*], 501; *Texier v. Sourin*, 5 *Duer*, 389; *Moore v. McKibbin*, 33 *Barb.*, 246).

II. The facts proved at the close of the plaintiff's case did not constitute any cause of action, and defendant's motion to dismiss the complaint ought to have been granted. (a) The fact of defendant's obtaining the deed on a promise to re-convey, even if it raised a trust for the plaintiff, was a parol trust, which the law does not recognize as against the plaintiff's deed, absolute on its face (*Sturtevant v. Sturtevant*, 20 *N. Y.*, 40). (b) Besides, the deed from the sheriff to defendant being unimpeached, plaintiff, at the time of the quit-claim, had nothing to convey and nothing to be re-conveyed.

III. The finding by the referee that the parties stood in the relation of mortgagor and mortgagee was a surprise to both parties, was unwarranted by the evidence, and was contrary to the evidence and the whole case made by the plaintiff. It was an hypothesis adopted by the referee at least irreconcilable with the testimony of both parties.

IV. Whether or not a deed absolute on its face is or is not a mortgage, may be proved by parol—and the referee ought to have allowed the defendant to prove that the deed was not given as a mortgage (*Despard v. Walbridge*, 15 *N. Y.*, 374).

V. The defendant proved the third defence set up in the answer, and the facts proved estopped plaintiff from afterwards insisting that the conveyance to the defendant was other than it purported to be. Defendant's buying the gore, and building, was inconsistent with a trust or mortgage (*Palmer v. Smith*, 10 *N. Y.* [6 *Seld.*], 303; *Hall v. Fisher*, 9 *Barb.*, 17; *Walter v. Post*, 6 *Duer*, 363).

VI. Defendant testified, and no attempt was made to contradict him, that in some years the property did not make up the ex-

penditures, yet the referee, because he considered it impossible to state an account between the parties with accuracy, concluded to make defendant no allowance for his excess of expenditure.

VII. A mortgagor cannot, at his option, abandon the right to redeem part of the premises. If he comes in to redeem, he must be ready to redeem all. To allow him to elect which part he will redeem, and which abandon, would lead to great injustice.

VIII. The judgment is so indefinite as to render it impossible to carry it into effect, or to know whether or not it has been complied with.

Sterne Chittenden, for the plaintiff, respondent.

BY THE COURT.*—ROBERTSON, J.—Although no exception was taken to the report of the referee upon the ground that the cause of action as found was not that set forth in the complaint, which seems to be necessary in some cases (*Belknap v. Seely*, 14 *N. Y.* [4 *Kern.*], 143; *Parsons v. Suydam*, 3 *E. D. Smith*, 280); yet the objection was distinctly taken on the motion to dismiss the complaint, after the plaintiff's evidence had been introduced, that he had not established his cause of action, and, as will presently be seen, all subsequent evidence was admitted for another purpose,—that of taking an account. A subsequent finding by a referee of a different cause of action, although fully proved, would still less deprive the defendant of the benefit of such an objection, since in fact it would be an admission that it was well founded.

This becomes the more proper, as the referee, after deciding upon mere circumstantial testimony, that the parties stood in the relation of mortgagor and mortgagee, so as to entitle the plaintiff merely to redeem the premises, instead of entirely avoiding the instruments assailed, prevented the defendant from introducing any direct testimony to disprove the existence of such relation. Neither party had charged or admitted it in the proceedings, or apparently attempted knowingly to prove or disprove it. Such an exclusion of evidence involves in the first place the question how far it was a proper exercise of discretion and not the deprivation of an absolute right. The order of introducing evidence, the re-calling of a

* Present MONCRIEF, ROBERTSON and MONELL. JJ.

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witness already examined, to prove a new fact or explain his testimony, and the opening of the case to allow new evidence, are within such discretion. A general introduction of new evidence on one side as to any particular point not before touched, without a like permission to the other, would hardly be a fair exercise of it: since the utter absence of testimony on one side as to material points might thus by the favor of the court after his adversary had closed his case be made the means of great injustice, by cutting off testimony to rebut that offered to make up such deficiency. Although the plaintiff's testimony may have been sufficient to sustain the case as found by the referee, it was also pertinent to that set out in the complaint, notwithstanding that nothing was said in it, as will appear hereafter, of any advances, or security, or mortgage. It is evident that although the referee should have already determined in his own mind, that the transactions between the parties were loans secured by a mortgage, he could not decree any relief according to that view, until the value of the different parts of the premises as well as the amount of advances had been proved, so that the evidence could not be closed until after such proof of value had been given. Evidence of value, however, would have some bearing on the nature of the instruments executed to the defendant: if it greatly exceeded the amounts advanced by him, it would tend to show them to be mortgages or something else than absolute conveyances. The permission given to the defendant to give proof of value to rebut that conclusion, would not the less render improper the exclusion of evidence on his part to prove there was no mortgage, as he was entitled to introduce, if any, all kinds of evidence to do so. He was permitted to introduce evidence of advances of money, but that affected the terms of redemption, and the state of the accounts, although in some measure it bore on the question of the nature of the instruments. He was even prevented from showing that the property did not yield enough, part of the time, to pay expenses, or that the plaintiff appropriated the rents during another part to his own use. It is possible, however, that the exclusion of the evidence on the defendant's part to disprove every relation of mortgagor or mortgagee, may have been a mere exercise of discretion, although stretched to its utmost limits, and as a question of surprise it may only be available

on a motion for a new trial at special term ; but there are questions involving the merits embraced in the appeal taken.

I have been unable to reconcile the cause of action, as found by the referee, with that made in the complaint. That does not state any money advanced or agreed to be advanced by the defendant : on the contrary, it alleges the payment of the Newell judgment by the plaintiff, his having furnished money to the defendant to pay those of Crosby and McDonald, under which the sale was made, and also that he paid the interest on the mortgage, the taxes and water rates, and the expenses of repairs and alterations, as well as received rents from tenants, and even from the defendant, apparently as evidence of ownership. There were no other moneys advanced or to be advanced. The plaintiff alleges in his complaint that the judgment confessed by him was given to enable the defendant to redeem, and on his promise to convey the property to the plaintiff as soon as he had done so. So, too, he alleges therein that the quit-claim was given to enable the defendant to procure a new loan, and on a promise of re-conveying immediately afterwards. No terms, qualifications, or conditions are stated as to such re-conveyance ; on the contrary, it is alleged to have been peremptorily demanded. There is no pretence of the defendant taking security for any sums to be advanced, no admission of any advance. The assumption that the instruments assailed by the complaint were taken as security for sums advanced and to be advanced, and valid as mortgages, contradicts the main charges in it. There is no evidence of any promise to re-convey, except the plaintiff's testimony ; and he does not state any terms or conditions of re-conveyance ; the defendant denies it.

The referee has also found that the plaintiff relinquished his right to the part of the premises on which Nos. 319 and 321 Bleeker Street are built. Whether this was done by writing, or orally, is not stated : there is no evidence of the former, and the only ground of inferring a relinquishment was that the plaintiff did not collect the rents of them, and told the builder, Rodgers, that he did not own the rear ground.

It will not be necessary to inquire minutely into the question whether there is evidence in the case to sustain the referee's findings, which must ultimately rest wholly upon the superior reliance to be placed upon the plaintiff's testimony rather than upon that of the defendant, notwithstanding the disproof of the

former in various particulars, such as his payment of different judgments, his ignorance as to such judgments, and his never having held himself out as agent or given receipts as such, his contradiction of himself, and the deplorable uncertainty and feebleness of his memory in many particulars, owing, perhaps, to his age. And yet the most important parts of the defendant's answer are virtually sustained by the report. That and the account on which it is based, concede that the defendant bought the Newell judgment, that the moneys for which the judgment was confessed were really due, that he paid his own moneys to redeem under the sheriff's sale, employed the moneys received from the Savings Bank to pay the Land and Trust Company, bought and paid for the gore and put up the buildings on it at his own expense, and paid five hundred dollars on account of the mortgage on the premises. The plaintiff undoubtedly let the premises and occupied part; received the rent of the rest and expended part of it for the support of himself and family, and furnished moneys therefrom to the defendant to pay taxes and incumbrances. The only question is, in what capacity he so received and expended the rents. The defendant claimed that the plaintiff acted as agent, and he is supported by the plaintiff's own statements in writing and under oath, and his denial of ownership, and the fact that for nearly ten years he made no attempt to get back his title, and did some further act to preclude himself from claiming the land on which 319 and 321 Bleecker Street stood. The defendant also stated that the plaintiff retained the amount expended, on the understanding he was to get his living out of the premises after paying taxes and incumbrances. This does not seem to be a very unnatural arrangement between a father and son, where the latter has twice saved the property from sacrifice by taking up judgments and redeeming it, and where the former has no means to pay off the latter's advances; and it is at least equally reconcilable with the facts proved, as the existence of a mortgage. The explanation given by the learned referee of the plaintiff's statements of being agent, that the defendant was mortgagee in possession, is unsatisfactory. The plaintiff claims he was never out of possession, he continued to occupy part of the premises, rented the rest, received the rents and paid the incumbrances as owner; the defendant occupied only a part, and for that the plaintiff says he paid him rent. One or the other

statement is clearly untrue. There is a singular absence of corroborative testimony, apparently within reach on both sides. And it appears to me very dangerous, after the lapse of ten years, to take away a title derived under hostile proceedings against the plaintiff, by converting an absolute deed from a sheriff into a mere mortgage to the party to whom it was given, solely on the contradictory and contradicted testimony of the supposed mortgagor.

The promise to give a deed back, could not convert the defendant into a mortgagee. He might be rendered a trustee, in case he had induced the plaintiff, himself, to abstain from redeeming; but there is no evidence of that. Any misrepresentation in regard to the quit-claim deed could not deprive the defendant of the title which he acquired by redemption under the Newell judgment, independently of his right to redeem under his own: and which he could have acquired without any assistance from the plaintiff.

But the main difficulty remains that the referee has given judgment on a cause of action as found by him, different from that sued upon and set out in the complaint. That was for fraud in obtaining a deed from the sheriff, and a quit-claim deed from the plaintiff. The fraud consisted in instigating a suit in the plaintiff's name, allowing a judgment to be obtained against him for attorneys' fees in such suit, omitting to apply moneys furnished to pay such claim, procuring a sale by a sheriff, using a previous judgment that had been paid by the plaintiff, and one newly confessed, to redeem from such sale, inducing the plaintiff to believe that the title was still in him, and procuring a quit-claim on a promise forthwith to re-convey, and a false representation of the object of procuring it. Such fraud not being proved, the referee has found a cause of action on contract by which the defendant took the Newell judgment, sheriff's and quit-claim deeds as security for moneys advanced and to be advanced. This is not a case of variance under the 16th section of the Code, but a failure to prove the cause of action in its entire scope and meaning (*Salters v. Genin*, 7 *Abb.*, 193; *Texier v. Gouin*, 5 *Duer*, 389; *Walter v. Bennet*, 16 *N. Y.*, 250; *Kelsey v. Western*, 2 *N. Y.* [2 *Comst.*], 500). An amendment of the proceedings to correspond with such findings, even if it could now be made, would change substantially the

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claim, an action to set aside entirely for fraud being entirely different from one to redeem from the mortgage.

No stronger case can well be imagined, of surprise by proving an entirely different cause of action from that set out in the complaint. Had the pleadings been at common law as formerly, a replication which had set up the cause of action such as that found would have been such a departure from the complaint as to make the replication defective. The issues were tried on a question of fraud, to which alone the testimony was directed. The referee held that by indirection and inference it established circumstantially a contract not set up in the complaint, yet refused to allow the defendant to introduce direct testimony to rebut such inference. The report, therefore, was unwarranted by the evidence.

The judgment should be reversed, and the order of reference discharged, a new trial to be had, and the costs of the appeal to abide the event.

CANNAVAN *against* CONKLIN.

New York Common Pleas ; General Term, November, 1865.

POSSESSION.—JURISDICTION OF DISTRICT COURT.

One who reserves a right of possession and use in a pier, though he has parted with the title, is still liable for injuries caused by its bad condition.

In an action for injuries arising from the defendant's negligence in not repairing the pier in his possession, though some evidence be given to show that he has parted with the title to the pier, the question of title is not raised so as to oust the district or justice's court of its jurisdiction.

Appeal from the district court.

Plaintiff Gerald Cannavan sued the defendants Herman Hesdorf, E. E. Conklin, James Schindler, and Charles Cawley, for damages, for loss of a horse through falling through a pier

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in the possession of those defendants. On the trial, the value of the horse, and its loss through the insecure condition of the pier, was shown. The defendants Conklin and Schindler set up that they had leased the pier to Herman Hesdorf, and no longer had any possession of or liability for the pier.

Proof was given, though the proof was conflicting, that defendants Conklin, &c., continued, under a reservation in the lease, to receive coal and ice at the pier, and kept their scales upon it.

The district court gave judgment against all the defendants, and the defendants E. E. Conklin, James Schindler and Charles Cowley appealed.

Titus B. Eldridge, for appellants.

A. H. Reavy, for respondents.—I. It is clear from the evidence that a case has been made against the appellants. It was proved that the plaintiff owned a horse on 24th November last: that he lawfully went upon the dock, that he drove his horse over the part appearing safe, that the horse fell through the dock, and subsequently died from the injuries, that the appellants were the owners and leased the dock to Hesdorf, but reserved and used that part where the horse fell; and that they knew the bad condition thereof. Nothing further was necessary to make them liable (*Cosgrove v. Smith*, 18 *N. Y.*, 82).

II. Whether the appellants had any interest in the dock at the time of the accident, is a question of fact deducible from the evidence, and this court will not disturb the finding of the justice on this ground. It is too well settled to be now questioned that where a party builds a dock, bridge, &c., the law imposes upon him an obligation to keep the same in proper repair; and these defendants having built and placed a scale upon the dock, were bound at their peril to make, and at all times keep, the dock as safe as it would have been if the scale had not been constructed. The objection that the appellants were not under obligations to keep the dock in repair, was not raised on the trial, and cannot be considered here (*Cosgrove v. Smith*, 18 *N. Y.*, 82).

III. It is in proof that the horse died from the injuries, and that he was worth from two hundred to two hundred and fifty

dollars. The appellant, Shindler, says that he was frequently on the dock, and that it was frequently out of repair. Hesdorf and Woods testify that they informed the appellants of the bad condition of the dock; yet they permitted the dock to remain out of repair. This is negligence, and for any loss arising therefrom they are liable.

IV. As to the motion for a non-suit, it cannot be possible that counsel are serious in arguing that the justice erred in denying the motion. The testimony bears examination, and requires no comment or argument from counsel to satisfy this court that a case had been made out, when the plaintiff rested.

V. The justice had jurisdiction of this case. It is an action for damages for the loss of a horse by the wrongful neglect of the appellants. This objection, however, was not raised on the trial.

CARDOZO, J.—The case presents only one question worthy of consideration.

The action in the cause below was to recover for the loss of a horse which was killed on the 24th of November, 1864, by falling through the pier at the foot of Forty-third street, on the North river.

The death of the horse, its value, and that the loss happened by reason of the negligence of the persons in possession of the pier, in suffering it to be in a dangerous and insecure condition, are sufficiently proven. The question is, whether the appellants occupied that relation to the pier when the accident occurred, as to make them responsible for it.

On the 1st of October, 1864, the appellants entered into an agreement with their co-defendant, Hesdorf, by which they let unto him "their pier at the foot of Forty-third street, North river, for the term of seven months from 1st day of October, inst., to May 1st, 1865, * * * * reserving to themselves the right to use the said dock, and occupy as much of the pier as their business may require."

The proof establishes that the appellants, before the making of this lease, had erected upon the pier, a pair of scales for the purpose of weighing ice and coal, and that both before and after the making of the lease, the appellants used the pier and the scales which they had so erected.

They were, therefore, after the making of the lease, while
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such use continued, in the possession of the pier jointly with the defendant Hesdorf. Indeed, the only one of the appellants who was examined on the trial, did not attempt to deny the possession and use of the pier down to about November 1st. The dispute is, whether the possession of the appellants then ceased, or continued and existed at the time of the loss. The accident happened on that part of the pier which had been used by the appellants. If the appellants were in possession of the pier when the accident occurred, they were clearly liable, irrespective of the question of ownership. The agreement that Hesdorf should keep the pier in as good condition as it was when the lease was made, does not affect the case. In the first place, Hesdorf was only to keep it in as good condition as it was at the time the lease was made, and the proof shows that it was in bad condition at that time, and so continued. Hesdorf was not to put the pier in good order, but to keep it in the same condition that it was in when the lease was made; and it does not appear that it was in any worse state when the accident happened than it was in when the lease was taken. However this may be, the undertaking of Hesdorf in that respect is a matter solely between him and the appellants, and cannot release the latter from their liability (growing out of their possession) to strangers. It may give them a claim for redress against Hesdorf, but that question does not arise here.

Hahn, a witness for the plaintiff, testified that on the 24th of November, 1864, which was after the accident, he had a load of coal carried from that pier to his yard; and John Wood, who weighed the coal, swore that it was weighed with the scales which the appellants had erected.

William Duane, another witness for the plaintiffs, stated that at and after the accident, these same scales, with which he had seen the appellants weigh ice, were yet on the pier. This was some evidence to show that the appellants then continued in possession of the pier, and if it be said that there was a conflict of testimony upon the point of possession, because one of the appellants swore that "he thought the scales were removed about the first of November," that presented a question of fact, of which the justice's finding is conclusive. Besides, although one of the appellants swore that they had sold the pier, and had delivered a written conveyance of it, they did not produce the

instrument, nor disclose its terms, nor did he swear that by the conveyance they had transferred anything except the title to the pier, and for aught that appeared, the appellants may not have parted with the right to use the pier, which they reserved by the agreement with Hesdorf. In the absence of such proof, I think the justice was justified in concluding that the appellants were in possession of the pier when the accident occurred; and if that be so, the question of title to the pier is immaterial, even if the appellants were in a position to raise that point. But they are not. They did not set up any such defence by way of answer, nor give the undertaking required by § 56 of the Code; and, therefore, under § 58, they are precluded from raising the question of title to the premises.

I think the judgment should be affirmed with costs.

WILBUR *against* OSTROM.

Supreme Court, Third District; Special Term. March, 1866.

SLANDER.—EVIDENCE.—NON-SUIT

In an action of slander, in charging the plaintiff with perjury, where the words alleged are not actionable in themselves, the plaintiff must show that the testimony charged to have been false was material and pertinent to the issue; and although the materiality and pertinency will be presumed as matter of law, yet the contrary may be shown by defendant.

If it appear on the whole case at the close of the proof in the action for slander, that the testimony charged to have been perjury was wholly immaterial, or that the part of it to which the charge of perjury related, if it related to part only, was immaterial, the defendant is entitled to a dismissal of the complaint.

Motion for a judgment upon a verdict.

The facts are stated in the opinion of the court.

Wilbur v. Ostrom.

J. L. Hill and *W. A. Beach*, for plaintiff.

D. McChesney and *A. Pond*, for defendant.

BOCKES, J.—This is an action of slander, and was tried before me at the Saratoga Circuit, September, 1865. The plaintiff had a verdict for one hundred and fifty dollars. On the trial, the question arose, whether the words charged and proved imputed the crime of perjury, inasmuch as the words related (as it was insisted), to a statement made by the plaintiff, when testifying as a witness on a trial before a justice of the peace, wholly irrelevant to the issue. A motion for non-suit was made on this ground, but the question was reserved by consent of the parties, and I then held, for the purposes of the trial, that the words charged in the complaint and proved, had reference to material testimony given by the plaintiff on the trial before the justice, and left to the jury only the question of damages.

The plaintiff now moves for judgment on the verdict, and the defendant at the same time renews his motion for non-suit, or dismissal of the complaint, reserved at the trial.

The charge against the plaintiff was, that he swore false—or swore to a lie—in an action then lately tried before Esq. COLE. It is not actionable to say of a person that he swore falsely, or swore to a lie, unless it be said in reference to his testimony given on the trial of a cause, or in some proceeding where an oath is by law authorized to be administered; and not then, unless the charge relate to some statement material and pertinent to the issue or subject matter of examination. To authorize a recovery for the uttering of the words charged in the complaint, the plaintiff was bound to show the trial before Esq. COLE, that he had jurisdiction, that the plaintiff was sworn, and gave material testimony on the trial, and that the words were spoken by the defendant of and concerning the plaintiff, and of and concerning his testimony so given on such trial (1 *Johns.*, 10; 20 *Johns.*, 344; 9 *Cow.*, 30; 1 *Wend.*, 475; 11 *Wend.*, 140; 12 *Wend.*, 500; 16 *Wend.*, 450; 14 *Wend.*, 120; 3 *Hill*, 572; 3 *Barb.*, 625; 31 *Barb.*, 106). It will be presumed that the party, if sworn and examined as a witness on the trial of a cause, gave material testimony. Such is the presumption of law. So, if a person charge another with swearing falsely, referring to his testimony given on the trial of a cause in a court of justice, it imports the crime of perjury, because of the presumption of law that his tes-

timony was material, and pertinent to the issue. In such case, the materiality of the testimony stands proved by legal intentment, and no affirmative proof of the fact is necessary (3 *Hill*, 572; 3 *Barb.*, 625). But it is competent for the defendant to rebut this legal presumption. He may show, if he can, that the testimony of the plaintiff was wholly and entirely immaterial, or that the part of his testimony to which the charge of false swearing related—in case it related to part only—was immaterial, and thus defeat the action (*see cases above cited*). And, indeed, the defence above suggested is available if it can be predicated on the whole cause at the close of the proof. If it then clearly appears that the charge of false swearing related to immaterial evidence, on which perjury could not be predicated, a recovery cannot be allowed, and a motion for non-suit or dismissal of the complaint should be granted. I am here speaking of cases like the present, where the words counted on are not actionable of themselves, but are made so by their relation to extraneous circumstances, which are required to be averred and proved. Holding these principles and rules of law in mind, how stands this case? There was an action tried before Esq. COLE, of which he had jurisdiction, wherein the plaintiff was sworn, and gave evidence as a witness, material to the issue. In the course of his examination, he testified, in substance, that he had not been to Crescent trying to get the school for Miss Knickerbocker. The defendant, in speaking of the plaintiff, and in relation to that part of his evidence above given, said he had sworn to a lie—had sworn false. I assume that the charge of false swearing was made in regard to the particular part of his testimony here stated. It was so understood by me at the trial, and on referring to the evidence, such must be I think, its fair and necessary construction and import. Mr. Pease says, "I heard the defendant make charges against the plaintiff in December last. He said William had sworn to a lie; and he could prove it by Mr. Haight. He said it was in a case between the Trustees and Miss Benedict. This was said in Mr. Ostrom's house." On his cross-examination Mr. Pease further stated: "He told me what he swore to a lie about. He said he swore that he had not been to Cohoes trying to get the school for Miss Knickerbocker. He said the question was asked him, and he said no." The other witness, Mr. Van Vrankin, said, "About April, 1864, the defendant was

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at my house, and began to talk about the school difficulty between Miss Benedict and the trustees. He said he did not know what to think of Isaac, for he was asked the question on that trial, whether he had not been to Crescent to get a school for Miss Knickerbocker. He said Isaac answered no. He added, a few days after this I saw Mr. Haight, and he told me Isaac had been there to try to get a school for Miss Knickerbocker. He then said Isaac swore false in that." I have not given all the testimony of these witnesses, but all, as I conceive, bearing on the points now under examination. So it must be understood, I think, that the charge of false swearing was made in relation to the plaintiff's statement, on his examination before Esq. COLE, that he had not been to Crescent to try to get a school for Miss Knickerbocker. This part of the plaintiff's testimony he asserted was false—that in this he swore to a lie. The question then is, was this part of the plaintiff's testimony material to the issue in the suit before Esq. COLE? That was an action by Miss Benedict against the trustees of the school district. The complaint stated that the trustees employed the plaintiff, Miss Benedict, to keep school from April 27th to October 13th, at two dollars per week—that she kept the school under the contract until the 15th May, when the defendants, the trustees, dismissed her, and refused to permit her to fulfil the contract, to her damage of fifty dollars. The defendant denied each and every allegation of the complaint, and also averred that the plaintiff quit voluntarily; and further, that she had been settled with and paid. On these pleadings the trial before Esq. COLE proceeded. It is plain that there was no issue before Esq. COLE, to which the testimony charged as false could be pertinent or material. Whether or not Mr. Wilbur had been to Crescent to try to get a school (or the school) for Miss Knickerbocker, was of no importance whatever. What he did say on that subject, as to which it was charged he swore falsely—swore to a lie—did not tend to prove or disprove any averment either in the complaint or answer. It was quite too remote, even if drawn out for the purpose of affecting his credibility. Whatever might have been his answer in that regard, he could not have been contradicted, and if false, perjury could not have been predicated thereon (*Ross v. Rouse*, 1 *Wend.*, 475; *Roberts v. Champlin*, 14 *Wend.*, 120; *Crookshank v. Gray and wife*, 20 *Johns.*, 344). In *Ross v.*

Rouse, the latter was called as a witness to prove conversations and agreements between the parties, previous to a contract being drawn up and executed. Ross, in speaking of Rouse's testimony in that regard said, "Every word you have sworn to is false;" also, "A. Rouse has sworn to a lie, and I can prove it." Here Rouse supposed he was giving material evidence when he was examined, and Ross clearly intended to charge him with the crime of perjury, yet the court held that slander could not be maintained. In *Crookshank v. Gray and wife*, the former said of Mrs. Gray that she had sworn to a lie. It seems there had been a trial before a justice of the peace. The action was trespass to recover damages for setting dogs on the plaintiff's cattle, and worrying them so that one of them died. Mrs. Gray was sworn as a witness, and testified that she saw the defendants' dog, worrying the plaintiff's steer, in the corner of the defendants' lot, nearest to the plaintiff's house: and that she was standing in the house, and the distance to the corner of the lot of the defendant was about thirty rods, and there were no trees or bushes in the way to obstruct her view. Crookshank, speaking of her testimony as to the distance at which she saw the dogs worrying the steer, said, she had sworn to a lie. Here again, doubtless, all parties supposed at the time Mrs. Gray was giving her testimony, and at the time of the uttering of the defamatory words, that her statement as to the distance mentioned by her was material to the case on trial, and Crookshank evidently intended to charge upon Mrs. Gray the crime of perjury. So, too, the hearers must have understood the charge to import to her that crime. Yet the court held that slander could not be maintained, and for the reason that the supposed defamatory words related to an immaterial statement, on which perjury could not be predicated.

These cases have not been overruled: on the contrary, they have often been cited as sound in principle. According to these authorities, as well as the others above cited, the point taken by the defendant's counsel on the trial, and there reserved by consent of parties, was well taken. The motion for judgment on the verdict must, therefore, be denied, and the plaintiff's complaint must be dismissed.

I have arrived at this conclusion reluctantly, as I can well see that the words charged were calculated to injure the plain-

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tiff in public esteem, and to excite painful reflections. The defendant was persistent in his charges, and refused to withdraw them when a conciliatory and neighborly application was made to him for that purpose. He doubtless intended all which his words implied in their ordinary meaning, as understood by persons unacquainted with the technicality under which he escapes legal responsibility: still I must adhere to the settled rules and principles of law. The plaintiff must be satisfied with the certificate afforded by the verdict of the jury, which exonerates him from all moral guilt, and stigmatizes the charge against his character as malicious and false, although he cannot hold it as an indemnity for his expenses in seeking a public vindication of his integrity.

The motion for non-suit must prevail.

LANSING *against* LANSING.

Supreme Court, Third District; General Term, September, 1865.

EXECUTORS' COMMISSIONS.—CHARGES UPON ACCOUNTING.

Where a will directs the executor to invest a fund, and accumulate the proceeds for the benefit of a minor, without anything indicating the intention to create a separate and distinct trust, the executor will hold as executor, rather than as a trustee; and his commissions are to be computed accordingly.

Where a fund is set apart, and the income given for the benefit of the legatee, without specifying a certain amount of income, the commissions and taxes are chargeable upon it, and not on the general estate.

An executor or other trustee of a fund invested in land, who pays the highway taxes thereon, by his personal labor, is entitled to be allowed the amount thereof in his account, as if it had been paid in money.

An executor is not chargeable with compound interest, except in clear cases. If the will directs an investment to be made upon a specified sort of security, and the executor finds none of the kind offering, he is not bound to seek the instructions of the court, but will be held to have performed his duty if in good faith and a sound discretion he adopts such investment as

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a prudent and intelligent man would do, managing his own affairs, not in reference to large gains, but the safety of the principal and the probable income.

Appeal from a surrogate's decree.

The appellant was Rachel S. Lansing, and the respondents were Douw F. Lansing, executor, &c., and Jane Ann Lansing.

On June the 23d, 1849, Peter Leversee made his last will and testament, and died July 10th, 1849. By the will, the testator directed his executors, at the expiration of four years after his decease, to invest out of his estate, upon safe and sufficient real estate securities, at the legal rate of interest, the sum of three thousand dollars, and to keep the same invested for the benefit of his granddaughter, Rachel S. Lansing, until she shall attain the age of twenty-one years, or until her death, applying the interest that might be received from said investment, or so much thereof as might be necessary, toward the support and education of said Rachel; and when she shall attain the age of twenty-one years, his executors are to pay the sum of three thousand dollars, with the accrued and accumulated interest, except so far as the use thereof has been necessary as aforesaid, and by said executors deemed proper for the education and support of said Rachel; and subject to the like necessity, his executors are directed to reinvest safely and securely, the interest they may receive during such investment, for the like benefit of said Rachel. A similar provision is made for the benefit of Sarah Maria Witbeck. The testator bequeaths specified legacies to Peter L. Witbeck, Sarah Maria Witbeck, his granddaughter, Helena Lansing, and to his grandsons, Isaac N. and Peter Leversee Lansing.

The testator also directs the payment of the sum of one hundred dollars annually, for the period of four years, to his daughter Jane Ann. The testator then devises to his daughter Jane Ann, his farm in Watervliet, consisting of about one hundred and twenty acres, and also devises to Peter L. Witbeck one hundred and twenty acres; he also made the following devise: "All the rest and residue of my estate, real and personal, whereof I may die seized or possessed, I hereby give, devise and bequeath (subject to the previous payment of the aforesaid legacies and investments aforesaid by my execu-

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tors) unto my said daughter Jane Ann, who is not, however, entitled to the possession of said rest and residue of my estate, or the rents, issues, and profits accruing therefrom, until four years after my decease."

Rachel having arrived at the age of twenty-one years, an accounting was had before the Surrogate of Albany county. All the parties interested were cited to appear, including the residuary legatee.

The respondent, on his final accounting, claimed there was due Rachel five thousand four hundred and forty-seven dollars and twenty-six cents, and the surrogate decided there was due Rachel, five thousand six hundred and forty-one dollars and twenty-six cents; to wit, principal, three thousand dollars; increase, three thousand and ninety-three dollars and twenty-six cents; taxes paid by respondent, two hundred and ninety-seven dollars and forty-four cents; and, as respondent's commissions on the gross increase of the legacy, one hundred and fifty-four dollars and fifty-six cents.

Rachel S. Lansing from this decree of the surrogate appealed to this court.

The executor's account, filed with the surrogate, showed an investment of the sum of three thousand dollars, the amount of the legacy, upon bond and mortgage on the 10th day of July, 1853, at seven per cent. per annum, and an allowance of interest, and the interest upon the annual interest received up to the time of the accounting, with a deduction of taxes, highway taxes, and commissions at five per cent. upon the amounts received. It also showed that on the 29th day of October, 1862, the mortgage was paid up, and the executor not being able to re-invest upon real estate security, he deposited the same in a savings bank at five per cent. interest, compounded every six months, which interest, with interest upon the same, was credited on this account. Objections were made, that the charges for taxes and commissions were not proper items of charge against the legacy or its increase; to the charges of commissions at five per cent.; to the deposit of the moneys in the savings bank, at an interest of five per cent.; to the charges for highway taxes, upon the ground that they had been retained by the executor as a compensation for his own services, he having performed the work himself. It was

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also claimed that the interest should be compounded from year to year.

A decree was made on the 15th of February, 1865, confirming the account, and bringing it down to December 23d, 1864, and directing payment to the appellant of five thousand six hundred and forty-one dollars and twenty-six cents, with interest at five per cent. from that time. Objection is made to the allowance of five per cent. instead of seven per cent. upon this account.

A. Lansing, for the appellant.

Ira O. Shafer, for the respondents.

By THE COURT.*—MILLER, J.—Several objections are made to the decree of the surrogate, which I will proceed to consider.

It is said that the surrogate erred in charging the appellant with commissions, taxes, and expenses.

By the will of the testator the executors were to make the investment of the legacy bequeathed to Rachel S. Lansing, and to keep the same invested until she arrived at the age of twenty-one years, or until her death. The executors were to apply the interest, or so much as they deemed proper, towards her support and education, and upon her arriving at the age of twenty-one years, they were to pay her the legacy and the accumulated interest, except so far as the use thereof was necessary, and deemed proper by said executors for the education and support of said Rachel. The rest, residue, and remainder of the estate is also disposed of subject to the previous payment of the legacies and investments by the executors.

It is very evident from the will that there was no trust created in the hands of the executors, distinct and separate from their duties as such. The testator does not name them as trustees, and manifests no intention that they should act otherwise than as executors, with instruction to perform certain duties by virtue of their powers as executors. Without proper words to establish a trust it cannot be inferred. The fund in the hands of the executor for the benefit of Rachel S. Lansing, was held by him in his character as an executor, and

* Present HOGEBOM, MILLER and INGALLS, JJ.

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the trust created thereby was a part and portion of the duties imposed upon him as an executor, and not distinctly and separately as a trustee. See *Drake v. Price*, 5 *N. Y.* [1 *Seld.*], 430; *Valentine v. Valentine*, 2 *Barb. Ch.*, 430, 438 & 9; *Westerfield v. Westerfield*, 1 *Barb.*, 198.

Acting then, as executor, and not as trustee, in the investment and management of the legacy, the executor was entitled to a commission of one per cent. upon the interest or increase of the fund, instead of five per cent., which was erroneously allowed him. This increase was not a separate and distinct receipt of money independent of what had been previously received, but merely an addition to the principal fund of the estate. This is expressly held in 5 *N. Y.* [1 *Seld.*], 430, and 2 *Barb. Ch.*, 430, before cited, and is well settled law. By statute the executor is only entitled to one per cent. for receiving and paying out sums over ten thousand dollars (*Session Laws* of 1863, 608, § 8), and the estate here showed assets to the amount of fifteen thousand dollars.

The suggestion that the executor was entitled to full commissions upon the principle of annual rests, has no application to a case like this. 5 *N. Y.* [1 *Seld.*], 430, was similar in most of its leading features to the present case, and that disposes of the question the other way.

Whether this commission should be taken out of the fund itself, or with the taxes and expenses be deducted from and chargeable on the general estate is another and a different question, which must be determined by looking at the provisions of the will and ascertaining so far as possible what the testator really intended.

It appears that the legatee was to receive the legacy upon attaining her majority, and such interest as remained after paying for her support and education.

The amount was specific, and it was subject to this deduction alone without any reference to commissions and taxes, and hence, it is claimed that it cannot be complied with, by the payment of anything less. It is true this is the only exception made, but it must be taken into consideration, that this amount was specially set apart by itself, as a fund for the benefit of the legatee, and as such it had a distinct character. It was taken out of the estate for a specific purpose, and the

legatee was to enjoy the interest, so far as it might be necessary, until she became of age.

It is quite possible that the residue of the estate may have been distributed before the time arrived when the legacy was due. Had such been the case, would the executor have been authorized to have retained an uncertain amount in his hands to meet the taxes and expenses?

This would scarcely have been considered as within the meaning and intention of the testator. He evidently meant to set apart this amount as a specific sum, the increase of which should be appropriated for the support and maintenance of his grandchild, and whatever remained to be re-invested, and the principal and interest paid over at the proper time; and did not contemplate a resort to the estate generally to keep down the taxes and commissions. When a fund is thus situated, and the party only entitled to the income, the authorities would appear to hold that it is subject to taxes and commissions. In 5 *N. Y.* [1 *Seld.*], 430, before cited, where the facts bear a striking similarity to the present case, it was conceded that a commission of only one per cent. was chargeable against the fund set apart.

In *Pinckney v. Pinckney* (1 *Bradf.*, 269) a testator gave to his wife the use and income of his real estate, and the interest of a specified sum, and it was held, that the taxes and expenses were chargeable upon the fund, and not upon the estate generally. The Court say, "The bequest should bear its own burden; if the testator had intended these charges to be paid out of the general fund, he would have said so; and there is no presumption of law in favor of the doctrine contended for. The widow is not to be paid a certain fixed sum annually, nor are the executors to invest such an amount as will produce a clear net income, but she is to receive the income of a particular specified property, and the interest of an investment of some thousand dollars, and the rest of the estate cannot be taxed so that she can obtain the gross instead of the net income.

Much of the reasoning here employed is applicable to the present case. The interest was to be paid, as provided, for certain purposes, and, at a specified period, the principal. No provision is made that any charges upon the fund should be

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paid out of the general estate, and why should not the legacy be chargeable with these expenses?

In *Lawrence v. Holden* (3 *Bradf.*, 142), where a testator gave his wife, by his will, the use of a dwelling house for life free and clear of all incumbrances, and in case she requested it, directed the property to be sold, and the proceeds invested, and the interest, income and dividends, applied to her use, it was held that the executors were not bound to pay the current taxes and assessments out of the testator's general estate.

In *Booth v. Ammerman*, (4 *Bradf.*, 129), the testator gave to his sister, the interest upon fifteen hundred dollars, in case she should become a widow, during her widowhood, payable annually, and it was held that taxes and commissions were chargeable upon the trust fund. The Court say, "The taxes which the executor may be compelled to pay, and also the commissions on the interest payable annually to the legatee, must come out of the interest, and are not chargeable upon the general estate."

The effect of the authorities cited clearly is, that a fund thus set apart where the income is given, without any particular amount being specified, is chargeable with commissions and taxes.

The objection made to the allowance for highway taxes, is founded upon the ground that the executor personally worked out the taxes. The commissions for moneys received and paid out are in lieu of all personal services of the executor or administrator, and he will not be allowed any further compensation for his trouble or loss (*D. Sur.*, 496).

Is the charge made in violation of this rule? We must assume that the road-taxes were imposed upon the fund, and that the executor was liable and bound to pay them. Instead of paying the money or licensing a person to do the work, he performed the service personally.

He paid it in that way. The amount was fixed and settled, and the estate legally obliged to pay it. It could make no difference whether paid in that way or by money. It is the same thing as if he had paid the money. He paid it by work instead of money, and it presents a case entirely different from one where services for which no compensation is fixed are rendered for the benefit of an estate, and a charge made for such services. There an opportunity is furnished to make out

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charges and audit them, while here the estate must pay a certain sum. I think that a rendition of the service must be considered as a liquidation and payment of the tax, for which the executor should be allowed.

It is said that the surrogate erred in excusing the executor from an investment of the interest upon the interest, annually. The will required that the interest should be invested, and if it had been made to appear in any way that the executor has neglected to perform the duty enjoined upon him in this respect, and that the fund has suffered by reason of it, or that more could have been realized than was done, then he should be held liable for compound interest. In his account filed with the surrogate he states, "that he has tried to keep the fund, together with the accrued and accumulated interest, invested and re-invested, as required by the will, and that he has not been able to do any better than is stated in the account. This account is rendered under oath, and *prima facie* must be considered as mainly correct, until assailed or impugned. It presents the facts, however, from which some adequate judgment may be formed as to the propriety of his conduct in the disposition of the fund. Now it is somewhat manifest that it would not be a very easy matter, at the expiration of each year, to re-invest the precise amount of compound interest received, so as to keep the fund in the process of constant accumulation, and, hence, to charge him with a strict accountability might inflict severe and unnecessary hardship.

The most which could be done under such circumstances, would be to fix a certain amount which had accumulated, and charge interest upon that sum. This also would be a difficult matter to carry out practically, and in the absence of any evidence to contradict or dispute the statement of the executor, to the effect that he has done the best he could, it would be unjust to charge him with compound interest annually. If there was any evidence to prove that the excuse offered was not a valid one, or any aspect of the case which indicated neglect, misconduct, or a want of good faith, there would be the strongest reason for holding him to the most rigid accountability. Those intrusted with the charge of trust funds, under no circumstances should be permitted to use them for their own profit and pecuniary advantage, and whenever they thus violate their obligations, the courts should see that they account strictly for their

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misconduct. They should require at their hands the greatest diligence and fidelity. An executor, administrator, or trustee is not allowed to make any gain, profit, or advantage from the use of the trust funds. If he negligently suffer the trust moneys to lie idle he is chargeable with simple interest. If he convert the trust moneys to his own use, and employ them in his business or trade, he is chargeable with *compound interest* (*Scheifflien v. Stewart*, 1 *Johns. Ch.*, 620).

In *Ackerman v. Emott* (4 *Barb.*, 626), STRONG, J., lays down the rule that compound interest is only allowed in cases of gross delinquency or of an intentional violation of duty (see also *Utica Ins. Co. v. Lynch*, 11 *Pa.*, 520; *Garness v. Gardner*, 1 *Edw. Ch.*, 128; *Willard's Eq. Jurisp.*, 614; 2 *Kent Com.*, 302, 231; *T. & B. Law of Trusts, &c.*, 594, 595).

If we apply these principles to the case at bar, I think a case is not made out within the rule laid down. It is not claimed that the executor used the funds in his own business, in trade, or that he made any particular profit from their use, nor is there anything to establish that he was guilty of any gross delinquency or violation of duty. In fact, he presents a statement, which, if it can be relied upon, will exonerate him from any charge of wilful omission of duty or misfeasance.

While trustees are held to great strictness in the management of trust funds, the court will deal leniently with them when it appears they have acted in good faith, and if no improper motive can be attributed to the trustee, the court will excuse the apparent breach of trust, unless the negligence is very gross (see *T. & B. Law of Trusts & Trustees*, 599, and authors there cited). As this case does not present features which indicate a departure from any settled rule of law, or bad faith on the part of the executor, I think that the objection is not available.

It is further urged that the surrogate erred in excusing the executor's deposit of funds in the savings bank at an interest of five per cent., payable semi-annually. By the will the executor was required to invest in real estate securities. It is not denied that it was difficult at the time when the money was paid into his hands to find securities of this character. Where special directions are given, they should be pursued if possible. If they cannot be followed, then the executor should look out for such other securities as the Court is known to have adopted, and when it has authorized and sanctioned any particular fund as

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a safe investment, he would be justified in making the investment there.

In *Ackerman v. Emott* (4 Barb., 626), it was held that under the general power to make investments, the Court would sanction any investment by executors and trustees in loans on real security, or in public stocks of the State, or of the United States, or in the loans of the New York Life and Trust Company. It was said in this case that the law regarded the *certainly* of an income more than its *magnitude*. PARKER, V. C., who originally heard the case, and from whose decision an appeal was taken, remarks: "The Court approves of a deposit in the New York Life and Trust Company, until a safe investment can be made on bond and mortgage." The executor, here being unable to invest upon real estate security, was bound to dispose of the fund in the best manner which was practicable under the circumstances existing. He would have been justified in depositing it with the New York Life and Trust Company; and in placing it elsewhere than in such securities as were sanctioned by the Court, he incurred the hazard of being made responsible in case of any loss. He put it in an institution where the rate of interest was quite as large as it would have been if deposited in the New York Life and Trust Company.

It would have brought a larger income if invested in government securities, but as it has turned out it would have been no safer than where it was.

It appears that the executor exercised a sound discretion in thus disposing of it, and as he has acted honestly, and as it does not appear that he could in any other way have disposed of the money so as to have it in his power to invest it in real estate securities, and as no such securities were offered, I think he was justified in the course which he pursued. He might, it is true, have made an application to the court for instructions, but he was under no obligation to incur such an expense, and was not bound to do so.

A trustee or executor is required in making investments to conduct himself faithfully, and to exercise a sound discretion, and when he observes that prudence and intelligence which is demanded of a man in the management of his own affairs, not in reference to large gains, but the safety of the principal, and its probable income, he should be sustained.

I think the surrogate erred in directing the payment of the
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sum due to the appellant, with interest at five per cent. There is no good reason why the amount should not draw interest at the usual legal rate from the time of the decree, and in this respect his decree should be corrected.

With the views I have expressed, it is not important to examine some other questions raised on the argument.

The proceedings must be remitted to the surrogate, with directions to correct the decree in the particulars named, with costs of appeal against the estate of the testator.

Order accordingly.

MOTT *against* CODDINGTON.

New York Superior Court; General Term, November, 1863.

VENUE.—JURISDICTION.—CAUSE OF ACTION.—VENDOR AND PURCHASER.

A cause of action for damages for injuries to real property by the negligence of the defendant, is necessarily local; and the courts of this State have not jurisdiction of such an action relating to real property without the State.

But a cause of action for breach of a covenant to convey real property, is transitory; and if the courts of this State obtain jurisdiction of the parties, they can entertain jurisdiction of the action.

A stipulation in a deed of real property, or in another instrument between the vendor and purchaser, not merged in the deed, that the vendor shall retain possession for a time, and then shall deliver possession to the purchaser, does not create the relation of landlord and tenant between them during such period.

The premises are meanwhile at the risk of the purchaser; and the vendor is not liable to him, upon such contract, for a loss by fire before the delivery of possession.

Even were it otherwise, the purchaser's acceptance of the deed, after the fire, with knowledge of the loss, would extinguish any claim to indemnity.

Appeal from an order denying a motion made by the plaintiff, upon the judge's minutes, for a new trial upon the exceptions taken at the trial.

The action was brought by Garrett S. Mott against Israel Coddington and John Herbert, to recover damages from the defendants, who were Israel Coddington and John Herbert, for the loss by fire of a mill and machinery, located at South Bound Brook, New Jersey.

In June, 1861, the plaintiff and defendants entered into an agreement, whereby the defendants agreed to convey to the plaintiff, certain premises at South Bound Brook, upon which was situated the mill in question. In consideration of this conveyance, the plaintiff agreed to convey to the defendants certain premises in the city of Brooklyn. The deeds were to have been exchanged at the office of Tracy, Wait & Olmstead, in the city of New York, "on or before the 22nd day of July, 1861." It was further agreed that the defendants should retain possession of the real estate at Bound Brook, to be conveyed to them as aforesaid, *until the 19th day of September, 1861, when they should deliver possession thereof to the plaintiff.* The deed for the Bound Brook property was executed on the 26th of June, and for the Brooklyn property on the 16th of July; but the deeds were not exchanged until some time afterwards, being both left in the hands of Tracy, Wait & Olmstead, until certain liens on the Brooklyn property could be removed.

While the deeds remained thus in escrow, and on the 13th of August, 1861, the defendants then being in possession under the agreement between the parties, the mill, machinery and out-buildings were destroyed by fire. The deeds were exchanged on the 16th of August, after the fire, at which time the plaintiff gave the defendants notice in writing that he should hold them responsible in damages for the loss of the mill, and requiring them to replace the same, prior to the 19th of September, ensuing.

The deed from the defendants to the plaintiff, of the mill property, contained this clause: "Subject, nevertheless, to the possession of said premises by said Coddington and Herbert, until the 22nd day of September, 1861, when they agree to deliver possession of the same to the said party of the second part, or his assignees."

The plaintiff claimed in his complaint to recover: First, damages for a breach of the agreement between the parties, in not delivering possession of the mill, &c., on the 19th of September, 1861; and Second, damages for the loss of the mill, &c., caused

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by the negligence of the defendants while in possession thereof under said agreement.

The action was tried before Mr. Justice MONCRIEF, and a jury, on the 11th day of March, 1863.

At the close of the plaintiff's evidence, the counsel for defendant moved to dismiss the complaint on the following grounds:

1. That the court has no jurisdiction, this action being for injury to real estate in the State of New Jersey.

2. The plaintiff must show that he was seized of the property when the injury happened, and that the defendants were in possession as tenants at the time of the fire.

3. When the plaintiff accepted the deed, after the fire occurred, his contract ceased to be the subject of an action, there being a covenant in the contract to keep the buildings there.

4. There is no proof of negligence being the proximate cause of the fire.

The justice dismissed the complaint, and the plaintiff excepted.

A motion for a new trial having been denied at special term, the plaintiff appealed from the order.

A. R. Dyett, for plaintiff, appellant.—I. As to the first ground of non-suit, this court has jurisdiction of this action. It is not an action local to New Jersey. The action is founded and based on the contract, which was made in this city, and was to be performed here. The fact that in one aspect of the cause of action one of the elements of it is negligence, does none the less make it an action on the contract, which was necessary as the basis of the action (4 *Moo. & S.*, 249; 13 *N. Y.* [3 *Kern.*], 587; 6 *Abb. Pr.*, 165, and cases cited in the opinion; *Strange*, 614; 1 *Wallace, Jr.*, 275, and cases at p. 282; *Story's Conflict of Laws*, §§ 35 (d.) 555). Besides, the cause of action in the complaint, in one aspect, is entirely based on the non-performance of the contract.

II. As to the second and third grounds of non-suit, which will be considered together:

1. The action was brought on the contract, and not on the deed. Both are under seal.

2. The clause in the contract upon which the action is brought

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is an independent covenant, and by its terms is to remain in force after the delivery of the deeds.

3. The delivery and acceptance of the deeds on both sides, did not, therefore, merge or affect the covenant referred to, nor was it so merged or affected by the clause in the deed, that the conveyance was made subject to the defendants' right of possession.

4. The last named clause in that deed was drawn and executed (before the fire), and was necessary to limit the covenants in the deed, and was rather a confirmation of the contract than a merger of it. When this cause of action arose, the defendants were in possession under the contract alone.

5. Upon the execution and delivery of the agreement, the plaintiff became the equitable owner of the lands and mill, machinery, &c., and the defendants held them merely as trustees (1 *Sugden on Vendors*, 190).

6. When the plaintiff conveyed his lands to the defendants, this equitable title of his became, if possible, stronger and of greater force than before.

7. But whether the plaintiff waived the cause of action, involves a question of intent, and that intent was a question of fact for the jury. The notice referred to, which was given in writing at the time, showed beyond all question, there was no intent to waive the cause of action.

8. But the notice just referred to as matter of law, saved the cause of action from being waived by the plaintiff or merged in the deed (*Moore v. Westervelt*, 1 *Bosw.*, 366).

9. The plaintiff could not have sued until after the 19th of September. The defendant had a right to retain possession until that time, and an action would have been premature if brought before. *Non-constat*, but the defendants would rebuild, and on the 19th September delivered possession of the premises in good order and condition. They had a right to do so. By what right could the plaintiff refuse to accept the deed of the premises—he did not accept possession—because the defendants would not then deliver possession, when they were not bound to do so until the 19th September following? All the plaintiff could do was to give the notice which he did give.

10. The deed of the Bound Brook property was acknowledged, and left with Tracy, Wait & Olmstead to be delivered to the plaintiff, some weeks prior to the fire, and if it did not then take

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effect all the plaintiff did was to comply with the condition upon which it was to be delivered to him, in order to render the delivery absolute, and this is *all* he did. He already had the equitable title, and the conveyance of the legal title, standing, at the worst, in *escrow*. The delivery of this deed, for the purpose of vesting title in the lands conveyed to the plaintiff, and sustaining his rights in and to the same and his cause of action here, even if the delivery to Tracy, Wait & Olmstead were in *escrow*, took effect from the time of its delivery to them (18 *Johns.*, 544; 13 *Id.*, 285; 4 *Id.*, 230; *Shep. Touch.*, 58-59; *Odell v. Wake*, 3 *Campb.*, 394; 1 *Johns. Cases*, 81; 1 *Johns. Ch.*, 288, 296, 304; 2 *Mass.*, 447; *Cruise's Dig.*, tit. 32, ch. II., 86 to 93; 9 *Id.*, 307; 3 *Reports*, 28, 29, 30).

11. It clearly follows, therefore, that the acceptance of the deed by the plaintiff, after the fire, was no waiver of the cause of action upon which he seeks to recover, nor was that cause of action merged in the deed (1 *Bosw.*, 366; 14 *Eng. L. and Eq.*, 320).

III. As to the third ground of non-suit, there was abundant evidence to go to the jury on the question of negligence—*vide supra* (1 *Parsons on Contracts*, 618,* note (p.); 1 *Campb. N. P.*, 138; 7 *B. Monroe*; 6 *Barr*, 360; 21 *Mo.*, 374; 7 *Hill*, 533; 8 *N. Y.* [4 *Seld.*], 375; 2 *E. D. Smith*, 413; 14 *E. L. & E.*, 320; 8 *B. Monroe*, 586).

Charles Tracy, for defendants, respondents.—I. The Court has no jurisdiction of the action, if it is for injuries to real estate in New Jersey (3 *Blackstone's Com.*, 294; 1 *Burrill's Prac.*, 123, notes *a.* and *b.*; 2 *Rev. Stat.*, 409, § 2; *Watts v. Kinney*, 6 *Hill*, 82; *Ring v. McCoun*, 3 *Sandf. S. Ct.*, 524; *Code of Procedure*, §§ 33, 123, 124).

II. If this is an action upon contract, the plaintiff has clearly no right to recover (*Masten v. Stratton*, 7 *Hill*, 101, 104; *Wilbur v. Brown*, 3 *Denio*, 356, 362). (1.) The parties were mere vendor and vendee, by an executory contract (*Gardiner v. Heartt*, 1 *N. Y.* [1 *Comst.*], 528). (2.) Even a landlord has no right of action against his tenant, for buildings burned by negligence of the tenant, unless there is an express contract of the tenant to sustain it (3 *Blackstone's Com.*, 229, *et nt.*, 4; *Countess of Shrewsbury's Case*, 5 *Coke's Rep.*, 13; *The Countess of Salop v. Crampton Croke Elizabeth*, 777, 784; *Co*

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Litt., section 7; *Stat. Gloucester*, 6 E. 5, c. 5. (3.) The vendee has an insurable interest, and if he does not take out a policy of insurance he stands as his own insurer (1 *Sugden on Vendors* (10th Eng. Ed.), 467-469, ch. 6, § 2; *Paine v. Miller*, 6 *Vesey*, 349, 353; *Dart on Vendors*, 117; *Gates v. Madison Co. Mut. Ins. Co.*, 5 *N. Y.* [1 *Seld.*], 469. (4.) At the time of the fire the plaintiff had not perfected any right to the Bound Brook property. He did not clear the title of the Brooklyn property from taxes, &c., until after the fire. He, therefore, had neither a legal title to the mill, nor a perfected equitable title. (5.) Neither the contract for the exchange, nor the deed, contains any express agreement to insure the buildings, or to preserve or renew them. (6.) The voluntary acceptance of the deed after the fire occurred,¹ was a waiver of all claims to restore or renew the buildings, and the plaintiff is estopped to maintain this action (*Addison on Contracts*, 172; *Co. Litt.*, 352, a). (7.) The contract was merged in the deed, and became extinct (*Jackson v. Camp*, 1 *Cow.*, 605; *Houghtaling v. Lewis*, 10 *Johns.*, 297; *Howes v. Barker*, 3 *Id.*, 506; *Witbeck v. Wayne*, 16 *N. Y.*, 532; *Morris v. Whiteher*, 20 *N. Y.*, 41).

III. It was not proved that the fire was caused by negligence of the defendants (1 *Parsons on Contracts*, 603; *Edwards on Bailments*, 312; *Stevenson v. Vrooman*, 18 *Barb.*, 250, 257; 1 *Greenleaf's Ev.*, §§ 200, 209; *Hayne v. Rogers*, 9 *Barn. & Cress.*, 577, 587; *Crain v. Petrie*, 6 *Hill*, 522, 524; *Armstrong v. Percy*, 5 *Wend.*, 535, 538; 1 *Saund. Pl. & Ev.*, 344; 2 *Greenleaf's Ev.*, § 256; *Butler v. Kent*, 19 *Johns.*, 223, 228).

BY THE COURT.*—MONELL, J.—The second cause of action stated in the plaintiff's complaint, namely, the injury occasioned by the negligent act of the defendants while in possession of the premises, this court, clearly, has not jurisdiction to try. This cause of action is for an injury to real property; is local in its nature, and must be tried in the State where the real property is situated. The distinction between local and transitory actions, as stated by Ch. J. MARSHALL (*Livingston v. Jefferson*, 1 *Brockenb.*, 203) is, that actions are to be deemed transitory where the transactions upon which they were founded might have taken place anywhere: but are local where the cause of

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action was in its nature necessarily local (*Watts v. Kinney*, 6 *Hill*, 82). Injury caused to real property by the negligent act of another, like permissive waste, is necessarily local.

If, however, the action for a breach of the agreement entered into between the parties can be sustained, I can see no jurisdictional difficulty in the way. That cause of action is for a breach of a covenant contained in a contract, and the action is necessarily upon the contract; and we, having obtained jurisdiction over the parties, can entertain jurisdiction of the cause of action. Actions upon contract have always been regarded as transitory, and are equally so, whether they relate to real or personal property (*Sutphen v. Fowler*, 9 *Paige*, 280; *Massie v. Watts*, 6 *Cranch*, 148). The claim is for damages for not performing a contract; the recovery, if any, must be personal, and cannot affect the real property.

This brings me to the remaining question in the case, namely, has the plaintiff shown any cause of action?

I have already disposed of the question of negligence, being of opinion that all evidence on that subject was inadmissible, this court not having jurisdiction of such a cause of action.

I do not think the relation existing between the parties intermediate the delivery of the deed and the 19th of September, was that of landlord and tenant. The defendants owed no such duty to the plaintiff as is expressed or implied in cases of tenancy. Their right to retain possession was determined by the limitation in the contract; but it was a mere retention of possession, the estate proceeding from the defendants, which was not affected or defeated by the subsequent delivery of the deed (*Bogart v. Buckhalter*, 2 *Den.*, 125; *Miller v. Avery*, 2 *Barb.*, 582). This is more especially so, as the deed continues the right in express terms.

Although possession, or the right of possession, follows the delivery of the deed, it is competent for the grantor to reserve the possession to himself for a determinate or indefinite period, either in the deed, or by a contemporaneous instrument not merged in, or extinguished by the deed. Such reservation does not constitute a tenancy.

In *Provost v. Calder* (2 *Wend.*, 517), the grantor reserved to himself and his heirs the exclusive right to a stream of water running through the land, and subsequently demised the privilege of erecting a dam and using the water, to a lessee. The

reservation was held to be valid. In this case it was said, a man may grant a messuage with the appurtenances, reserving one of them. So, too, he may grant a tract of land, reserving all mines, and he may grant a tract of land, reserving all mill sites, and such a reservation is valid.

In *Dygart v. Matthews* (11 *Wend.*, 36), a reservation, out of the grant, of so much land as is necessary for the use of a grist mill, was sustained.

In *Jackson v. Swart* (20 *Johns.*, 85), the grantors reserved to themselves the use of the premises during their natural lives, and the question arose whether the deed was void, as conveying a fee to commence *in futuro*; and it was held that the deed operated as a covenant to stand seized, if the estate of the grantee was to take effect after the deaths of the grantors. And the case of *Jackson v. Dunspagh* (1 *Johns. Cas.*, 91), is referred to, where it is expressly decided that a deed of bargain and sale, founded on a pecuniary consideration, to take effect *in futuro*, was effectual.

In all these cases, where the reservation has been clear, and the intention of the parties undoubted, it has been sustained; and that, too, whether it was of a part only, or of the whole of the granted premises.

In this case the reservation is of the possession, which carries with it the use of all the granted premises for a definite period. And, in my view, it is not material whether we look for the reservation in the contract between the parties, or in the deed; the former, as we have seen, not being extinguished by, or merged in the latter, either is effectual and operative; although the deed may be resorted to as furnishing evidence of the intention to make the reservation, if further evidence was needed.

If it is true, then, that the reservation of the possession of the whole of the granted premises was effectual, and the defendants had the right to continue to occupy them until the 19th of September (or the 22nd, as named in the deed), then it follows there was no actual delivery of the premises, nor had the plaintiff any right of entry at the time of the happening of the fire. In short, the grantees had not at that time delivered, nor did they, until some time afterwards, deliver possession of the premises to the grantee. The contract remained executory, and the execution and delivery of the deed, though it conveyed the legal title, was only a partial performance of the contract, and

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did not carry with it the possession, nor the right to the possession, until the expiration of the period reserved to the grantors to occupy and possess the premises.

Such possession was not under, nor in subordination to, the rights of the grantee. It was created by the act and deed of the grantors, and originated at the time that the legal estate was passing from them. Such legal estate, however, did not vest in the grantee *in presenti*; and as respects the possession, was suspended, or, as I might better express it, did not take effect, until the termination of the right which the grantors had reserved to themselves.

I have thus endeavored to show that the relation of landlord and tenant did not exist between the parties; and I have spent more time in this effort than I should have done, had not the able argument of the counsel for the appellant raised a doubt in my mind on the subject. But I cannot yield my judgment to his convictions, in the face of principles and authority which are to me most satisfactory.

The act of the parties, as evidenced by their written contract, was the selling and buying of the premises in question; hence, the relation between them was that of vendor and vendee. The plaintiff, as vendee, became the equitable owner of the estate, and, according to well-settled principles, could be compelled to pay the consideration, even though the estate itself should be destroyed between the date of the agreement, and the conveyance (*Sugden on Vendors* [6th Am. Ed.], 468). From the time the contract was stated by the parties, the premises were at the risk of the vendee, who had an insurable interest, and could have protected himself from loss by fire. At any rate, as he was entitled to any benefit which might accrue to the estate in the interim between the contract and deed, he must take the risk, and bear the burthen of loss.

But even if this were not so, the acceptance of the deed by the plaintiff, after the fire, with knowledge of the loss, would extinguish any right to indemnity he otherwise might have had (*Paine v. Miller*, 6 Ves. Jr., 349).

I think the plaintiff has failed to show any cause of action against the defendants, and that the justice decided correctly in dismissing the complaint.

The order appealed from should be affirmed, with costs.

ROBERTSON, J.—The agreement for the exchange of land in this case, permitted the defendants to retain possession of the real estate, to be conveyed by them, until a time subsequent to that when the destruction of the mill therein complained of in this case occurred, when they were to *deliver possession of the same to the plaintiff*. The deed actually delivered, conveyed the premises *in presenti*, subject to a possession of them by the defendants, until three days after the time fixed in the agreement, when they agreed to deliver possession of the premises to the plaintiff. No rent was agreed to be paid for such occupation, nor was anything else required to be done from which it could be inferred that the relation of landlord and tenant existed between the parties. The question then is, whether such deed operated to convey the estate, to begin only from the date fixed in such clause, leaving the estate in the defendants, and no relation subsisting between the parties until then, or whether the defendants conveyed the whole estate in fee, taking back an estate for the period during which they were to retain possession.

An exception must be part of the thing granted, wherein it differs from a reservation, which is not part of it, but some new thing issuing out of it (*Craig v. Wells*, 1 *N. Y.* [1 *Comst.*], 315). Words of reservation may create an exception, however (*Provost v. Calder*, 2 *Wend.*, 517; *Borst v. Empie*, 5 *N. Y.* [1 *Seld.*], 33), and sometimes an implied covenant or estoppel (*Case v. Haight*, 3 *Wend.*, 632). On the other hand, words of *exception* may create a *reservation* (*Dygart v. Matthews*, 1 *Wend.*, 35). An exception must be certain, and what would otherwise be an exception may be construed as a reservation in order to prevent its being void for uncertainty (*Thompson v. Gregory*, 4 *Johns.*, 81), but it must be construed as the former, if it can be reduced to certainty (*Jackson v. Vermilyea*, 6 *Cow.*, 677). The reservation of an estate for life in the grantors of an estate in fee (husband and wife), although void as such, was held to create a covenant to stand seized for the use of the survivor (the wife), although a conveyance in fee to take effect *in futuro* might be void (*Jackson v. Swart*, 20 *Johns.*, 85), except under the statute of uses (*Jackson v. Dunsburgh*, 1 *Johns. Cas.*, 91).

It is not material whether there can be a technical reservation of an estate in the premises or not, provided the deed

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can be construed so as to prevent an estate from vesting until some future day. The Revised Statutes make it the duty of courts to carry into effect the intent of parties in an instrument affecting real estate, so far as it can be gathered from the whole (1 *Rev. Stat.*, 748, § 2). There can be no doubt, that by the deed in question in this case, the defendants intended only to create an estate in the plaintiff, to begin at the end of their possession. No relation, therefore, of landlord and tenant existed, and no right of action could accrue for waste.

The plaintiff had an insurable interest in the buildings burnt, but the defendants had not (*McLaren v. Hartford Fire Ins. Co.*, 5 *N. Y.* [1 *Seld.*], 151). They were not bound to restore them either under the agreement (*Sugden on Vendors*, 6th *Am. Ed.*, 468), or the deed, which contains merely a covenant to deliver possession of the premises, but not in the same condition as they were at its date.

It is not necessary, therefore, for me to express any opinion as to the ability of the plaintiff to maintain an action in the State for permissive waste on land in New Jersey.

I therefore concur in the judgment of affirmance.

WHITE *against* SCHUYLER.

Supreme Court, Third District; General Term, September, 1865.

SPECIFIC PERFORMANCE.

Specific performance of an agreement to transfer stock, may be decreed, where the contract to convey is clear, and the uncertain value of the stock renders it difficult to do justice by an award of damages.

Appeal from a judgment in favor of the plaintiff, rendered under the direction of Mr. Justice MILLER, on a trial before him, without a jury, at the Albany Circuit, in May, 1864.

White v. Schuyler.

The action was brought by John S. White against Thomas Schuyler, to compel the defendant to transfer to the plaintiff one hundred and eighty-two shares of the capital stock of "Schuyler's Line Steam Tow Boat Association," and to pay him certain dividends received thereon, which the defendant claimed to hold as his own property, by virtue of a contract dated June 2d, 1862. The judgment was for a specific performance of this contract. No costs of the action were given to either party as against the other.

The leading features of the case, as found by the justice who tried the cause, were as follows :

Prior to the 2d of June, 1862, the plaintiff was the owner of one hundred and eighty-two shares of the capital stock of "Schuyler Line Steam Tow Boat Association," of the par value of eighteen thousand two hundred dollars, for which a certificate had been duly issued, and on the 2d of June, in consideration of fifteen thousand dollars paid by the defendant on account of the plaintiff, the stock was delivered to the defendant, and thereupon he gave the plaintiff an agreement in writing, to the effect that Schuyler would, on the 1st day of February, 1863, upon payment by White to him of sixteen thousand five hundred dollars, and indemnifying him against any loss on account of having endorsed his paper, sell and convey to White, the one hundred and eighty-two shares of stock in question, with any dividend which it should earn in the year 1862 ; and if, at that time, the value of the stock was more than sixteen thousand five hundred dollars, the excess in value should be paid to Mr. H. Read, receiver of the Bank of the Capital, on the indebtedness of White to said receiver, if the said indebtedness should not sooner be paid. That on the 10th of February, 1863, the defendant received nine thousand one hundred dollars for a dividend on said stock, and on the 10th of February, 1864, a further dividend of five thousand four hundred and sixty dollars.

That on the part of the defendant there was a waiver of strict performance by the plaintiff on the day named, and the time was extended, and within the extended time the plaintiff tendered the defendant sixteen thousand five hundred dollars, and demanded the stock and dividends, and the defendant refused to transfer the stock, or pay over the dividends.

That the defendant had not sustained any loss by reason of

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endorsing the plaintiff's paper, and was not under any liability on that account, and the indebtedness of the plaintiff to the receiver of the Bank of the Capital had been fully paid and discharged.

Upon these facts found, a judgment was directed, that upon payment of sixteen thousand five hundred dollars, with interest from February 1st, 1863, deducting the dividends received by the defendant, the defendant transfer the stock to the plaintiff, with all dividends and accumulations since the 10th of February, 1864.

The testimony was, in some respects, conflicting, especially in regard to the extension of the time for performance, and to what period such extension was made.

John H. Reynolds, for the plaintiff, respondent.

Ira Shafer, for defendant, appellant.

BY THE COURT.*—HOGEBROOM, J.—No other objections to the enforcement of the specific performance of this contract are made, than the want of mutuality, and the failure on the part of the plaintiff to perform or offer to perform, within the stipulated time. Sections 729, 736 of *Story's Equity Jurisprudence*, vol. 2, are cited in support of the proposition as to want of mutuality, but I do not see that they are directly applicable. On the contrary, the same author, at section 736, *a.* states as follows,—“But it is not necessary to the specific performance of a written agreement that it should be signed by the party seeking to enforce it; if the agreement is certain, fair and just, in all its parts, and signed by the party sought to be charged, that is sufficient; *the want of mutuality is no objection to its enforcement.*” The following authorities are cited in support of this doctrine. *Woodward v. Aspinwall*, 3 *Sandf. Ch.*, 292; *In re Hunter*, 1 *Edw. Ch.*, 1; *McCrea v. Purmort*, 16 *Wend.*, 460; *Clason v. Bailey*, 14 *Johns.*, 484.

It is not objected that the contract relates to a class of property, in regard to which it is not usual to direct a specific performance, upon the ground that the party has an adequate remedy at law in damages. But if such objection had been taken, I think it ought not to have been sustained. 1. Because

* Present, HOGEBROOM, MILLER and INGALLS, JJ.

the parties evidently contemplated, and specially contracted for a re-conveyance of the stock. 2. Because, as well on account of the uncertain value of the stock in market, and the infrequent sales of it, as the varying character and success of the business which the stock represented, it was difficult, if not impossible, to do justice between the parties in an award of damages. These are controlling reasons in equity for a specific performance (*Philips v. Berger*, 2 *Barb.*, 609; 2 *Story's Eq., Tit. Specific Performance*, §§ 716-718; 6 *Johns. Ch.*, 222; *Seymour v. Delancy*, 3 *Cow.*, 445).

The other objection to a specific performance, to wit: the omission to perform within the time to which the right of performance was extended by the stipulation or understanding, and conduct of the parties,—involves a question of fact. The judge at the special term before whom the cause was tried, has examined that question with care, has evidently given it much attention, and, notwithstanding the criticisms of the learned counsel for the appellant, was, I think, warranted in his conclusions upon a view of the testimony, which, on scrutinizing the witnesses, he was permitted to take.

I do not deem it necessary to review the facts, nor to restate the conclusions, which the testimony justifies. I am, myself, of opinion that upon the plaintiff's version of the conduct and understanding of the parties, the contract was fairly open for performance up to the 28th of February, and that the unequivocal refusal of the defendant to perform on that day, either rendered an absolute tender and offer to perform before suit brought unnecessary, or made the tender on the 16th of March as preliminary to the institution of a suit for specific performance in season, especially as the court below did not charge the defendant with costs.

I am, therefore, of opinion, if we are to put the same interpretation upon the character of the contract that the judge did at the trial of the cause, that the judgment should be affirmed with the costs of appeal.

This makes it unnecessary to examine the other question made in the case, to wit: whether the whole transaction was not in the like nature of a security for the loan of money.

If that question be open for examination here, and doubt in regard to the other aspect of the case made it expedient for the plaintiff to prevent it, I should be loth to enter upon the ex-

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amination after an adverse conclusion by the court below, and a decision in favor of the plaintiff on other grounds, and, in general, should think it better to remand the case for the purpose of re-examination, and the presentation of a distinct exception or review on that point by the party aggrieved.

I am for affirming the judgment of the court below with costs.

TURNER *against* SMITH.

New York Common Pleas; Special Term, May, 1866.

INJUNCTION.—EXECUTION AGAINST ONE PARTNER.

An action will lie by a partner, to enjoin an individual judgment creditor of the copartner of the plaintiff, from selling upon execution the interest of the copartner in the partnership assets, where it is made to appear by the complaint that the co-partner whose interest has been seized has no interest in fact in the assets, and the plaintiff offers to submit to an accounting to show this to be the case.

It seems, that since the abolition of the distinction between legal and equitable forms of procedure, the court out of which the execution was issued should stay proceedings thereon, under such circumstances, without putting the parties to an action.

Motion to dissolve an injunction.

The action was brought by Alfred W. Turner against Bernice B. Smith, James Turner and John Kelly, the sheriff of the city and county of New York, to enjoin the defendants, Kelly and Smith, from selling, on execution against James Turner, the interest of the latter in the property of the firm of James Turner & Son, of which the plaintiff was the junior member.

The allegations of the complaint were as follows:

That the plaintiff is engaged in the business of selling oils at wholesale, at No. 78 Maiden lane, in the city of New York, in company with James Turner, under the firm name of "James Turner & Son." That said Turner & Son now have on hand

at their said place of business, at No. 78 Maiden lane, a quantity of oils [*designating the kinds, and total value*], which is all the property owned by said firm.

That said firm is indebted for liabilities incurred in the prosecution of their said business to the full value of the goods on hand, on good and valid debts due against said copartnership.

That said James Turner, this plaintiff's partner, is justly indebted to said copartnership, for money drawn from said firm for his support and maintenance, over and above all profits, interests and gains in said copartnership, and over and above all interests in any of the copartnership property, in the sum of more than four thousand dollars, and that upon a fair and just accounting, and closing up of said partnership affairs, it would be found that said James Turner has no interest, either at law or in equity, in any of the assets or property of said firm; but, on the contrary, his indebtedness to said firm exceeds his interest in said partnership assets and property, to the amount of more than four thousand dollars.

That said firm, notwithstanding the embarrassments of said James Turner, is in good credit, and is constantly receiving and selling goods, and have reasonable prospects of doing a good trade in the future, and of making money.

That said defendant Smith, in December, 1862, recovered a judgment in the Supreme Court of the State of New York, against said James Turner, for one thousand two hundred and seven dollars and seven cents, on a demand in no way connected with the partnership matters of said firm. That on the 20th day of February, inst., the said defendant, Smith, caused an execution to be issued against said James Turner, and on the 21st day of February, inst., directed the sheriff of the city of New York to levy upon the goods of said firm, which the said sheriff did.

That the said defendant, Smith, now threatens to have said goods of said firm advertised and sold, and has caused to be placed in the store of the said firm at No. 78 Maiden lane, aforesaid, a person who forbids this plaintiff, or any one acting under him, from selling, or disposing of, or meddling with, said goods.

That the said defendant, Sheriff Kelly, aforesaid, threatens to proceed under the directions of his co-defendant, Smith, to sell the said goods of said firm.

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This plaintiff further says, that said firm has notified the plaintiff, or his attorney, of the willingness of said firm to submit their books, papers and affairs to the inspection of said Smith, to the end that he may ascertain whether the said James Turner has any interest in said firm that could be taken, either at law or in equity, to pay the individual debts of said James Turner.

And this plaintiff alleges, on information and belief, that it is the purpose and aim of said Smith to harass and vex and injure the business of said firm unnecessarily, because of the inability of one of said firm to pay his individual debts.

This plaintiff further says, that it will work irreparable injury to this plaintiff, and destroy the credit and business of said firm to have said goods of said firm sold on such execution, or to have the same removed or interfered with by said sheriff for the purpose of working out any supposed interest of the said James Turner under said execution of said Smith.

Wherefore this plaintiff prays this honorable court to restrain and enjoin the said defendants, their agents, attorneys or employees, from selling or meddling with said goods, or in any manner interrupting the business of said firm, until an account can be taken in equity, to the end that it may be ascertained whether the said James Turner has any interest in said copartnership goods which could be applied on said execution.

The plaintiff also prays that all proceedings on said execution, so far as any attempt may be made to sell the property of said firm, may be stayed.

The plaintiff prays, also, such other and further relief in the premises as shall be deemed just and equitable.

The plaintiff makes no personal claim against said sheriff for any damages, nor for any costs in this suit.

Upon this complaint, the plaintiff obtained a preliminary injunction. The sheriff answered, admitting the execution, and that he levied pursuant to its directions, the property being the only property of the judgment debtor known to him in the county; and denied any intent to harass, and any knowledge, etc., of the other allegations.

Upon these pleadings, the defendants now moved to dissolve the injunction.

Brown, Hall & Vanderpoel, for the sheriff; and *Arthur Gardner*, for the defendant Smith, in support of the motion.

Amos G. Hull, opposed.—I. The defendants are premature in their motion. It cannot be made until all the defendants have answered (1 *Barb. Ch.*, 639 ; 1 *Paige*, 164 ; 2 *Johns. Ch.*, 149).

II. The separate estate or interest of the copartner, in any of the copartnership property, is only his share of that part of the copartnership effects, or of the proceeds thereof, which remain after the debts of the firm, and the demands of his copartners as such are satisfied (*Buchan v. Sumner*, 2 *Barb. Ch.*, 165 ; *Muir v. Leitch*, 7 *Barb.*, 340). The correct practice to be pursued in a case like this, is, to do as the plaintiff has done, viz. : to obtain an order staying proceedings on the execution until an account can be taken in equity (*Scrugham v. Carter*, 12 *Wend.*, 131). If the parties desire it the partnership accounts should all be liquidated before any sale on the execution (2 *Ves. & Beame*, 300. See also the cases of *Williams & Gibbs v. Ganning*, 2 *Johns.*, 280 ; *Watson v. Taylor*, 2 *Ves. & Beame* ; 15 *Ves.*, 559, 560).

III. The equities of the complaint not only are not denied, but are admitted. Sheriff Kelly admits that it was his purpose to sell the interest of James Turner. That is precisely what we allege, and it is to prevent that, until an account in equity can be taken, that we invoke the power of this court. The answer denies only on information and belief. We allege the facts in our complaint positively.

A complaint made upon information and belief will not support an injunction (*Hecker v. The Mayor*, 18 *Abb. Pr.*, 369). Now if information and belief will not sustain an injunction, then information and belief will not sustain an answer that seeks to dissolve it.

BRADY, J.—The complaint in this action alleges substantially, that the partner whose interest has been seized under execution, has no interest in fact in the assets of the copartnership, and the plaintiff is willing to refer the subject at once, that it may be investigated and determined. This seems to me to be a very reasonable mode of procedure, more particularly when, as in this case, the plaintiff has filed a consent that the reference be proceeded with at once. Injunctions in these cases do not meet with favor from the courts.

In *Mowbray v. Lawrence* (13 *Abbott's Pr.*, 317 ; S. C., 22 *How.*,

107), it is said that authorities in this State are adverse to the interference of a court of equity by injunction to restrain the sale of the interest of one partner in copartnership property, on judgment and execution against him, to collect an individual debt ; but the refusal to grant the injunction in that case was predicated of the fact that it did not appear by the averments in the complaint that the debtor had no interest which the creditor should be allowed to reach by a sale on his execution. The case of *Philips v. Cook* (24 *Wend.*, 389), cited by Justice LEONARD in the case mentioned, is not, however, an authority against the exercise of the equity power invoked by this action. It was an action of trespass, and the court held that it could not be maintained against the plaintiff for seizing the partnership property to satisfy an execution against one of the partners, and delivering the property sold to the purchaser. The subject under consideration was elaborately discussed by Justice COWEN, and the power and practice of courts of equity in such cases to some extent exemplified.

He said there is no doubt of the equitable rule in England, New York, and most of the States, that though the sheriff may, at law, levy on and sell the right of the individual partner, which shall pass absolutely to the purchaser, yet he takes subject to an account between the partners, which, if it eventuate against him, his purchase may go for nothing. That, however, is his own look out. It is no reason why the creditor should be deprived of his legal right to sell, or the purchaser of his legal right to buy.

The case of *Moody v. Payne* (2 *Johns. Ch.*, 548), is not authority, as I understand it, against the exercise of the equity power. The Chancellor seems to have entertained the opinion that the creditor could only sell the interest of the individual partner, subject to the rights of the joint creditors, and not the property itself; the rule being in equity that the partnership accounts should all be liquidated before a sale on execution (*Watson v. Taylor*, 2 *Ves. & Bea.*; *Walter v. Muth*, 16 *Johns.*, 107 *w.*), and he expressed the opinion, therefore, that if any sacrifice was made by the sale of the interest of one partner by reason of the uncertainty, it affected only that partner.

It was said by Chief Justice SAVAGE, in *Scrugham v. Carter* (12 *Wend.*, 134), that if the sheriff by virtue of an execution against one of several partners, takes possession of the property,

an action at law does not lie against him. The court from which the execution issued would stay proceedings upon it to give time to have an account taken in equity. In *Parker v. Piston* (5 *Bos. & P.*, 288), the defendant was one of two partners, and the creditors applied to extend the return of the *fiery facias*, the object being to prevent the partnership goods from being sold until an account could be taken of the several claims upon them. The court were of the opinion that there was no ground for this interposition; that the safest line of conduct for the sheriff to pursue, was to put some person in possession of the defendant's property as vendee, leaving him and the parties interested to contest the matter in equity, when a bill might be filed, stating that he had taken possession of the property and praying that it might not be disposed of until all claims were arranged.

In *Chapman v. Koops*, reported in the same volume of *Bos. & P.*, 289, a similar application was denied, but Lord ALVANLEY, Ch. J., said, among other things: "We are desirous to restrain the plaintiff's execution because it is alleged that he stands in the shoes of a partner, who would not have a right to molest the other partners until all accounts between them had been settled. But if the other partners wish to take advantage of this circumstance, they ought to file a bill in equity against the vendee of the sheriff, or they may buy in the property when put up for sale.

CHAMBRE, J., said the short objection to this application is that the court cannot direct a partnership account to be taken without assuming a jurisdiction that does not belong to it.

The case of *Philips v. Cook*, *supra*, being a determination of the right of the sheriff to sell the property of the co-partnership on an execution against one of the partners, and deliver it to the vendee, makes the interposition of equity in a proper case eminently just. The right mentioned does not commend itself to our best consideration. It does not seem to be fair that property owned by several should be taken away on a process against one, where that one, in consequence of his relation to the others, financial and otherwise, may have little or no interest in it. The firm creditors have superior right and equity, and the partners stand in better position towards the property as against each other than the individual creditor. The interest of each is only the share that remains

after the partnership accounts are taken. There is little doubt that the right under discussion is one asserted by the courts of law to avoid encroachment upon equity jurisdiction, and it is not the only instance in which the division of jurisdictions, legal and equitable, has led to useless and absurd circumlocution. There is no doubt that equity had the power to interfere in a case like this, and would do so, and since the blending of the different tribunals in one under our present system, there is no reason why a stay should not be granted on an execution, as stated by Justice WILLARD, in accordance with the suggestion of SAVAGE, Ch. J., in *Serugham v. Carter*, *supra*.

The plaintiff has, however, brought his action in equity, and alleges that there is nothing to be sold.

Assuming that to be so, it would be very unjust to allow the partnership property to be sold and delivered, leaving the plaintiff to pursue the vendee, who would not be obliged to give security, and might not only dispose of the property, but be utterly insolvent.

I think there are reasons why the right to sell and deliver should never have been given. The right to sell the interest, leaving the purchaser to ascertain what it was, and a rule requiring a reference to be submitted to by all partners would have subserved the ends of justice better than the existing rule.

In this case I think the plaintiff entitled to an injunction, and the defendant to the reference which the plaintiff tendered, if they feel disposed to require it at the present stage of the action.

Reverend
5 J. & C. 274
3 Ann 1.

PHILIPPE *against* JAMES.

New York Superior Court; General Term, February, 1865.

BANKRUPTCY.—PLEADING.

Where a defendant relies on a foreign discharge in bankruptcy, as a bar, or on his having entitled himself to a certificate in bankruptcy, by which the cause of action is abated, he must set forth not only the statute, but the certificate or discharge, and the prior proceedings which warranted the granting of it; or, if no discharge or certificate has been granted, the facts in the proceedings relied on, as an accord.

Of the requisite proceedings to obtain a discharge under the English insolvent laws; and what must be pleaded in setting up a discharge under such statutes.

Appeal from a judgment on demurrer to answer.

The defendant, Edwin James, was sued by John Philippe and George Hilder, as trustees under a deed made by the defendant in England.

The defendant answered, admitting the alleged contract, and setting up certain proceedings in bankruptcy in England. The answer alleged the presenting of a petition to the Court of Bankruptcy, with the concurrence of, and signed by, one-third in number and value of the defendant's creditors; that the court appointed a trustee, to whom he surrendered all his estate, and the other and further proceedings, there taken in accordance with the said act, which, as he alleged, entitled him to receive a certificate from the said court, discharging him from his debts. It did not state that such a certificate was granted, nor that he was examined in respect to the matter of said petition by a commissioner in bankruptcy, or that such commissioner directed a meeting of all his creditors, or that any meeting of them was held, or that the requisite or any number of creditors agreed to accept any arrangement or composition.

The plaintiffs moved at special term in 1863, to compel the defendant to make the answer more definite and certain, and

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the motion was granted by the chief justice, who rendered the following opinion:

BOSWORTH, CH. J.—Where a defendant relies upon a discharge in bankruptcy in another country, as a bar to the action, or, as in this case, on a certificate of a commissioner in bankruptcy, under Act of 7 & 8 Vic., ch. 70, entitled “An Act for facilitating arrangements between debtors and creditors,” he must set forth in his answer:

First. The statute under which the alleged proceedings were had, and certificate was granted (*Holmes v. Broughton*, 10 *Wend.*, 75; *Minse v. Douglass*, 5 *N. Y.* [1 *Seld.*], 447). That is not done in this case, and the answer is therefore defective.

Second. The answer, besides pleading the certificate, must set forth, with particularity, such prior proceedings as warranted the granting of the certificate.

If no certificate has been granted, and enough has been done to extinguish the plaintiffs' cause of action, the material facts relied upon as affecting the extinguishment, or the defendant's discharge from liability, must be pleaded.

If a certificate has been granted, it must be pleaded, and other facts be alleged, which, if true, authorizes the granting of it (*Thomas v. Robinson*, 3 *Wend.*, 267, 617; *Loudo v. Sampson*, 2 *Smith*, 659; 1 *Chitty's P.*, 514, 515; 3 *Id.*, 913; *Barnes v. Harris*, 3 *Barb.*, 603; *Ayres v. Covill*, 18 *Barb.*, 260; *Alcard v. Wesson*, 14 *English L. and Eq.*, 360; 16 *Barb.*, 481).

The motion must be granted.

The defendant then served an amended answer, in which, after alleging the presentation of the petition, he stated that in the petition was “set forth a proposal, which was the only proposal this defendant could make, for the future payment or the compromise of such debts and engagements, and which proposal was truly and *bona-fide* made, and which this defendant was then ready and willing to carry out and fulfill. And this defendant further says, that more than one-third in number and value of his said creditors assented to such proposal. And the said petitioner further prayed that such proposal should be carried into effect, under the superintendence and control of the said court, and that he, the said petitioning debtor, should, in the meantime, be protected from ar-

rest by order of the said court, which said petition is on the files of the said court in bankruptcy, at London, in England."

The amended answer further alleged that the commissioner in bankruptcy approved the proceedings, and found "that the proposal was reasonable, and proper to be executed under the direction of the said court," and that he called a meeting of all the creditors to act on it.

"That at such meeting of creditors, where this defendant was not present, nor was he required by law to be present, but was represented by his attorney and solicitor, the major part in number and value of his said creditors, whose debts exceeded twenty pounds, did assent to the proposal of the said petitioning debtor. This defendant cannot set forth the date or time when the second meeting of the said creditors was called by the said president, but is informed and believes that such second meeting was duly called and held, and that due notice was given to the said creditors, in the same manner and form as for the first meeting; but he states that at such second meeting one-third in number and value of the creditors of the petitioning debtor were present, either in person or by an authorized agent. * * * That at such second meeting of the creditors, three-fifths in number and value of all the creditors then present did agree, resolve and accept such arrangement as was assented to at the first meeting, and that the terms thereof were reduced into writing, and that the same were duly signed, and that the same were binding and of full force against the plaintiffs in this action, both at law and in equity, under the powers and provisions of the hereinbefore recited act, and that their agents and solicitors had due notice, under the provisions of the the said act, of the several meetings of creditors held as before mentioned. The defendant further states, that within fifteen days after the passage of the above resolution and agreement to accept his proposition, the same was submitted to the commissioner acting in the matter of the said petition, who decided and ruled the same to be reasonable, and proper to be executed under the direction of the court, and caused the same to be filed and entered of record thereon.

"And this defendant further answers and says, that he fully complied with all the provisions of the said act, and became entitled to receive a certificate from the said court, discharging him from his debts and liabilities as fully and effectually as if

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the same were a certificate of conformity under the statutes relating to bankrupts. That this defendant, not having applied for the said certificate, does not plead the same as a bar or extinguishment of the debt of the plaintiffs for which this action is brought, but answers and says, that the plaintiffs are not entitled to maintain this action against him; that the plaintiffs, who were then creditors of this defendant, in respect of the same debt for which this action is brought in this court, were bound by the arrangement made and entered into by the creditors, and the necessary majority of the same, under the provisions of the act under which the petition was presented to the Court of Bankruptcy in England; that the plaintiffs are not entitled to maintain this action against this defendant until all the proceedings taken in the said Court of Bankruptcy in England are vacated and annulled; that the plaintiffs are not entitled to maintain this action against this defendant until the estate, effects and property ceded and given up by this defendant for the plaintiffs with the other creditors of this defendant are restored and returned to him; that the proposal and arrangement made and entered into with the creditors of this defendant, under the powers and provisions of the said act, are binding in law upon the plaintiffs, until the same is reversed and annulled by the said court; that under the provisions of the said act, the said arrangement is an accord and satisfaction in law of all damages sustained by the plaintiffs, by the breaches of covenants, by this defendant, contained in the deed upon which the action is brought, and which have accrued up to the time of the commencement of this action."

The statute referred to was set forth at length annexed to the answer as amended.

To this answer the plaintiff demurred for insufficiency.

The plaintiff demurred to the amended answer, and judgment was given for him on the demurrer, with leave to defendant to amend by alleging that he had obtained a certificate of discharge, or that the plaintiff had participated in property delivered to the Registrar or official assignee, if so advised.

From this order the defendant appealed to the general term.

J. W. Ashmead, for the defendant, appellant.

Isaac Van Winkle, for the plaintiff, respondent;—Cited *Trary v. Dakin*, 7 *Johns.*, 75; *Cruger v. Cropsey*, 3 *Id.*, 242; *Sackett v. Andross*, 5 *Hill*, 330; *Van Elten v. Hunt*, 6 *Id.*, 313; and cases cited by Ch. Justice Bosworth.

BY THE COURT.*—ROBERTSON, CH. J.—The statute under which the defendant claims to have been released from all responsibility to the plaintiffs (7 & 8 *Viet.*, ch. 70), was made for the benefit of insolvents, who were not traders subject to the English bankrupt acts. Proceedings thereunder can only be instituted by the insolvent himself.

Their object is a forced discharge of the debtor by part of his creditors, who are reluctant, on the adoption by a certain proportion of all of them, of terms of composition or compromise offered by him, modified by them, and sanctioned by the court in which the proceedings are taken. As to those creditors, therefore, who have not expressly assented to such discharge upon such terms, either at the meetings held for the purpose, or by receiving part of the debtor's estate, under such compromise, it is an involuntary discharge of their claims by operation of law, and none of the features of an accord and satisfaction belong to it. This statute is very similar in all respects to the allowance of a concordat by the French Code Civil (Articles 505–516), except that the latter may be compulsory. In the nature of the petition under it, and objections allowed thereto, it also resembles our Insolvent Act.

Such English statute provides for the making by the insolvent of "such proposal as he is able to make for the future payment or compromise of his debts and engagements" (§ 1), and for several meetings of his creditors for the acceptance or modification of such proposal, and to secure the certainty and mode of its being carried into effect, before any official certificate or protection, similar to that given by the statutes of bankruptcy, is to be given by the officer before whom such proceedings are had. A certain proportion of creditors in number and value (one-third) are required to sign such petition (§ 1). The first of such meetings is to be convened by order of the commissioners to whom the application is made

* Present, ROBERTSON, CH. J., GARVIN and McCUNN, JJ.

(§ 2), and the second by the president of such first meeting appointed by such commissioners (§ 3); in case at such meeting a majority of all the creditors in number and value, or a certain proportion in numbers or value (nine-tenths), whose debts exceed a certain sum (£20), assent to such proposal or a modification thereof (§ 4). The second meeting is required to have the same proportion of creditors in number and value present as was required to sign the petition, to make their proceedings of any avail (§ 5). A "resolution or agreement adopted at such second meeting to accept the arrangement or composition assented to at the first meeting, if reduced to writing and signed by a certain proportion of the creditors in number and value then present (three-fifths), or a certain other proportion in value or in number to those whose debts exceed a certain sum (£20), is declared, if confirmed as therein required, to be binding upon the insolvent and all his creditors who had notice of both such meetings" (§ 5). Such "resolution or agreement" is required to be submitted to the acting commissioner within a certain time, and he, in case he "think it reasonable and proper to be executed under the direction of the court," is to cause it to be filed and entered of record (§ 6). An indorsement by him on a certificate of such filing, of a protection of the debtor from arrest is to have that effect, except in certain cases of fraud committed by him (*Ib.*). A like protection from arrest may be given by such commissioner on the presentation of the petition (§ 7). Such commissioner may also in case of any difficulty in the execution of such resolution or agreement, convene special meetings of the creditors, at which, if one-third of them in number and value are present, or if the commissioner approve of their action, a majority of those present may, by resolution, confirm, alter, or annul the whole, or any part of such prior resolution or agreement with like effect as if part thereof (§ 11). It is not until the last meeting of creditors after such resolution or agreement is carried into effect, and the creditors "satisfied according to its tenor," and when the trustee appointed by the court has fully performed his trust, that the commissioner is to give a certificate of the filing of the petition, and the making and performance of the resolution or agreement of creditors, which is to be as operative as a certificate of conformity under the statutes of bankruptcy (§§ 12, 13). During the period between the second meeting

and such final meeting, the insolvent may be brought before the commissioner, and examined touching his property and his creditors (§ 10).

It would be rather difficult to plead the agreement assented to at the first and second meetings of the creditors, if either altered, amended, or annulled at a special meeting called under the eleventh section, as an accord and satisfaction, or any other defence. There is nothing in the statute releasing the debtor from liability upon the adoption of such first agreement, although he may be thereupon protected from arrest. It is very evident the words in the fifth section "shall thenceforth be binding and of full force," mean nothing more than that such resolution shall have such force as is given to it by such statute, not only against those assenting to it, but also those who were notified of such meetings, otherwise it would be inconsistent with the power of altering or annulling it given by the subsequent sections.

The very able discussion by the learned judge, who delivered the opinion of the court in the case of *The Matter of Bonaffe* (23 *N. Y.*, 185, *et seq.*) of the entire dependence of the effect of the concordat, under the French Code of Commerce, in discharging the debtor from his debts on its terms, is just as applicable to the compromise offered under the statute in question.

The answer in this case does not even set forth the nature of the proposal made by the defendant on the presentation of his petition, so that this court can see that it was for a discharge from liability, nor whether it was for the future payment or for the compromise of his debts, but only in the alternative; nor does it allege that any notice of the second meeting was given to the plaintiffs, but only to "said creditors," which follows a statement of an assent of a majority of creditors to the defendant's proposal, and "to their agents and solicitors." Whereas, the statute in question, by its fourth section, clearly provides only for personal notice, unless a substituted notice is ordered. No appointment of a trustee or surrender to him of property is alleged in such answer.

Such answer claims that the defendant was entitled to receive a certificate of compliance with the statute, discharging him from liability as under the Bankrupt Act, whose terms, however, it entirely omits to state. That could not be ascer-

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tained except by the judicial declaration of the commissioner after a performance of the terms of the compromise, and a discharge of the trustee, and no alteration of the terms of the original proposal by any general meeting of creditors, or a special one ordered under the eleventh section of the Act. The purpose of such Act being, as stated in its title, merely to "facilitate arrangements between creditors and debtors," not to discharge insolvents, no one could properly be entitled to such certificate until such final meeting of creditors, and discharge of the trustee after the proposal for compromise had been carried out. I do not perceive that the language of the opinion delivered before in this court sanctions any interpretation of the English statute, as authorizing an extinguishment of the debt, by the mere approbation of the debtors' proposal by the court after the second meeting. The withholding of such certificate until such final settlement, and giving no effect to any of the proceedings until that time, is conclusive as to the purport of the statute.

How far the amendment allowed would better the defendant's defence is not necessary to decide.

As it stands, it is insufficient, and the judgment, therefore, must be affirmed with costs.

*affirmed
Sec. 502
Keyed, 81*

THE PEOPLE, *on the relation of* THE MARKET COMMISSIONERS, *against* THE COMMON COUNCIL OF NEW YORK.

Supreme Court, First District; General Term, February, 1866.

MUNICIPAL CORPORATION.—MANDAMUS.

Under a statute (*Laws of 1865, ch. 180*) making it the duty of a municipal corporation to create a stock or fund to an amount and upon terms of payment fixed in the statute, and requiring the comptroller of the corporation to prepare and issue the stock, and sell the same,—the corporation

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have a duty to perform in creating the stock by ordinance, before the comptroller can issue it.

A mandamus to compel the corporation to create the stock, is properly addressed to the Common Council, although the corporation are designated in the statute as the Mayor, Aldermen, and Commonalty of the city

Appeal from an order made at special term, granting a mandamus.

The application was made under the act of the Legislature (*Session Laws of 1865*, 211, ch. 180) to compel the Common Council, of the city of New York to create, by the passage of an ordinance to that effect, the seventy-five thousand dollars of "Market Stock," provided by the fifth section of the statute.

The defendants read no counter affidavits below, and the application was disposed of on the showing made by the relators.

It appeared by the moving papers:

1. That a demand on behalf of the relators had been made upon the Common Council, for the creation of the stock, in the month of May, 1865.

2. That no steps were ever taken, by the Common Council, towards a compliance with the demand, save that the matter in both boards was referred to some committee.

3. That by their non-action, the work of the commission had been, and still was, delayed.

4. That the property specified in the act, as the site of the proposed market, was purchased in the name of the corporation, in 1857, for that purpose, at a cost of nearly two hundred thousand dollars, and, by legislative action, dedicated "to the use and purpose of a market;" and that down to the present time it had remained unoccupied and unproductive (see *Lowber Case*, 7 *Abb. Pr.*, 158, and *Proceedings of Aldermen and Councilmen*, Aug. 16, 1856; Nov. 6, 1856; Feb. 18, 1857).

5. That the relators had no remedy except by mandamus.

By the statute in question it is enacted that "The Mayor, Aldermen and Commonalty of the city of New York are hereby authorized and directed to create a public fund or stock, to be denominated 'Market Stock'" [*here follow the amount, terms, &c.*], "the said Mayor, Aldermen and Commonalty being hereby authorized and directed to pledge the faith of the city and county, and the same is hereby specifically pledged for the redemption of the said stock, and the several parts thereof, when

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the same shall become due and redeemable under the provisions of this section, by tax upon the estates, real and personal, in the city of New York, subject to taxation.

"The comptroller of the said city of New York shall, within thirty days after being required in writing, by said commissioners, so to do, prepare and issue the said stock * * * to the highest bidder therefor, and the proceeds thereof be forthwith deposited with the chamberlain of said city of New York, to the credit of the commissioners appointed under this act."

Richard O'Gorman and W. C. Trull, for the defendants.—I. No action upon the part of the Common Council is requisite or necessary to the creation of the stock in question. (a) The act fixes the amount of the stock, the rate of interest, and the time when payable; and, also, the time when the stock shall be redeemable, and provides a fund for the redemption of the stock, and pledges the faith and credit of the city and county for its redemption. Nothing remains for the Common Council to do, and it would be the merest surplusage for that body to enact an ordinance providing for the creation of a stock which is already provided for and created by statute. The remedy of the relators is apparent. Relying upon the provisions of the fifth section of the act they should demand of the comptroller a compliance with the requirements of the sixth section, which makes it his duty to issue the stock within thirty days after its issue is demanded by the commissioners. Should the Common Council enact an ordinance in the precise words of the fifth section of the act of 1855, it would add nothing to the existence of the stock. The true construction of the fifth and sixth sections of the act of 1865 is to construe the former section as providing for the creation of a stock by the corporation, which is to be created by the comptroller's issuing the stock in obedience to the requirements of the sixth section.

II. The Common Council owe no duty to the relators. (a) It is an elemental rule that a party applying for a mandamus must show a clear legal right to have the act done, the performance of which he seeks to enforce, and must establish a corresponding duty upon the part of those against whom the writ is asked, to perform the act as required (*People ex rel. Green v. Wood*, 35 *Barb.*, 653, 659, 661). The provisions of the act relied upon to support the order appealed from impose no duty upon the

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Common Council. The language of the act is, "The Mayor, Aldermen and Commonality of the city of New York are hereby directed to create a public fund or stock," &c., &c. The duty is imposed upon the corporation, and not upon the Common Council. The Common Council is not the corporation, but only one of its constituent parts, and its members are merely the agents and servants of the corporation, which is composed of all the citizens of the city (*Clarke v. City of Rochester*, 5 *Abb. Pr.*, 115; *Lowber v. Mayor*, 3 *Abb. Pr.*, 329, 336; *Wyatt v. Benson*, 4 *Abb. Pr.*, 186). The duty being imposed upon the corporation, that is the body to whom, within the rule above stated, the writ of mandamus should have been directed. When the court determines that the corporation owes to the relators some duty with reference to the creation of the stock in question, and issues its writ of mandamus commanding the performance of that duty, if obedience to that mandate requires any action upon the part of the Common Council, the corporation will take care that such action is taken in the discharge of the duty which the Common Council owe to it (*People ex rel. Green v. Wood*, *supra*).

Cephas Brainerd, and *James S. Stearns*, for the relators, respondents.—It was contended by the relators, and cannot be disputed with any show of reason, that the conduct of the Common Council showed, plainly, an intention to defeat the purposes of the statute; that these *quasi* legislators were seeking, by evasions and delays, to render the completion of the work within the time fixed by the statute impossible; that the facts warrant the court in finding a refusal (*The Queen, &c., v. Commissioner of Navigation, &c.*, 8 *A. & E.*, 901; *The Queen, &c. v. Vestrymen of St. Margaret's*, *Id.*, 889).

The various counsel for the Common Council conceded, at special term, that the writ must issue unless the following objections were well taken:

1. No action on the part of the Common Council is required; the stock is created by the statute, and the mandamus should run to the comptroller, to compel him to issue the stock, if, on demand, he refuses to do it.

2. The Act says, the Mayor, Aldermen, &c., shall create this stock, therefore the *mandamus* should run to the whole Corporation.

3. The Common Council, *i. e.*, the Boards of Aldermen and N. S.—VOL. I.—21.

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Councilmen, being legislative, and vested with discretion, cannot be compelled to vote in any specific way.

4. The writ should run to Committees of the two Boards, to whom the matter is referred.

I. The Legislature had the power to pass this statute, and create this commission (*People v. Draper*, 15 *N. Y.*, 532; *Sill v. The Village of Corning*, *Id.*, 297; *Darlington v. The Mayor*, 28 *How. Pr.*, 352; *People v. Pinckney*, 32 *N. Y.*, 377; *People v. Bachelor*, 22 *N. Y.*, 128).

II. Under the law, as thus established, every one of the objections urged is set at rest. The supreme power, in respect of the erection of this market, being in the Legislature, they have the unquestioned right to select the means by which it shall be built. They can call in as many collateral agencies as may seem good, or employ but one; they can order the payment of the whole of these construction bills, in money realized immediately by taxation, or they can make the burden less heavy by providing for the issue of bonds. They can order the Mayor or any other official, to execute those bonds. They can order unimproved property of the city to be sold for the purpose (per DENIO, Ch. J., in *Darlington v. The Mayor*, *supra*), and they can make it imperative upon any local officer or body of officers to perform any part, great or small, in the work proposed.

It is no answer to this to say that, in respect of other matters, these local officers, or bodies of officers, are vested with discretionary powers, for here the Legislature, in the exercise of its acknowledged powers, has imposed an additional duty upon them, in respect of which they are not vested with any discretion; in respect of which they are mere executive or ministerial officers, charged with a duty which they cannot avoid, *i. e.*, the creation of this "market stock."

III. We will now answer, in the order stated, the several objections:

1. No action required on the part of the Common Council, &c.

It is plain, upon a mere reading of section 6, that the Comptroller cannot act until the stock has been created as provided in section 5. It is the stock mentioned in that section, and none other, which he is to issue; stock created as indicated in that section, and not by an Act of the Legislature.

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A fatal answer to an application for a writ against the Comptroller would be: "There has been no stock as yet created under section 5." The Legislature did not intend to create the stock, for they have commanded another body to do it in the section 5, *i. e.*, the legislative department of the Corporation; the Common Council. The 12th section of the "Metropolitan Fire District" law is a precedent for a law creating stock. That commands the Comptroller to issue bonds, and the Mayor to sign them and affix the seal of the Corporation. Here no such thing is done or contemplated.

The compilations of Judge DAVIES and Mr. VALENTINE are full of precedents for the sections 5 and 6 of this law, and it is drawn according to the forms sanctioned by a usage of many years. And, under these statutes, it has been the uniform practice of the Common Council to enact an ordinance creating the stock, and for the Comptroller to then perform the ministerial duty of issuing it. Again, there are no words in the statute which give any color for the argument in behalf of the Common Council; it does not purport to create the stock,—it pledges the faith of the city for the redemption of the stock to be created under section 5.

2. The Act specifies the corporation, and the writ should so run, &c. This is a fallacy: upon whom could service be made—the Mayor, the Comptroller, and Corporation Counsel? What would be the answer to it? The Common Council only can create the stock, and a writ should be issued against them. And how can they be compelled to act? Only by a writ which, by proper service, shall take effect upon them individually. They must each be compelled by a mandatory process to vote in favor of the proposed ordinance. It is the duty of this commission to obtain a *mandamus*, generally, against the corporation; for the name used in the Act is but the name of the corporation. (The Mayor, the Common Council, and the Comptroller, are not the corporation, nor are they all, when combined with other officials, the corporation. DENIO, Ch. J., in *Darlington v. The Mayor*.) And then this corporation, after going to the Court of Appeals on the question of the right to the writ, is, on being defeated, to resort to the same course in respect to the Common Council, to obtain the passage of the ordinance, upon which they go to the Court of Appeals; then a like proceeding to compel the Mayor to sign

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with a like litigation; then the same thing in regard to the Comptroller in every respect; but what if, at the outset, the Corporation Counsel should decline to sue out any of these writs? Would not this commission be at last reduced to the necessity, notwithstanding the proposition of the respondents, to take these extraordinary proceedings against some division of the city government; and if that be true, then why not upon the immediate body, whose willful perverseness is now attempting to defeat the purpose of the legislature, and the wishes of the residents of the city. Do not courts seek to avoid circuitry of action? Then, upon the reason of the thing, the proposition is absurd.

How stands it upon authority? This precise question was made on the return to the alternative writ in *Commonwealth ex rel. Hamilton v. Select and Common Councils of Pittsburgh* (34 *Penn.*, 496), carefully examined, and utterly repudiated by the court.

So, the opinion of the court, by BRONSON, J. (pp. 460-461), in *McCullough v. The Mayor of Brooklyn* (23 *Wend.*, 458), is decisive that the writ lies against the body upon whom the duty of "putting the necessary machinery in motion," is imposed.

So, *People v. Common Council of Syracuse* (20 *How. Pr.*, 521) is strong to the same point. There the act of opening the streets was an act of the corporation, but the Common Council was to set the machinery in motion, and, accordingly, the writ was issued against them.

The earlier English cases upon these topics are collected in *Archbold's Practice of the Crown Office*, 239-250, and in *Tapping on Mandamus* (Law Lib., N. S., 142), 94.

But, finally, the statutes of this State put this question at rest. Ch. 603, *Laws of 1853*, § 5 (*Sess. L.*, 1853, pp. 1135, 1136), provides that no debt of the character contemplated in the act under consideration shall be contracted, except by virtue of an ordinance passed by the Common Council of the municipal corporation by a vote of not less than two-thirds. There are many provisions in that statute which cannot apply to this case, but so much of the section as is here referred to, clearly applies. Of course, no one contends that the power to pass an ordinance creating this stock or debt resides anywhere in the corporate author-

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ities but the Common Council (see *Amended Charter, Sess. L.*, 1857, vol. 1, p. 874, § 5).

3. But we are told that the Common Council is vested with a discretion, and cannot be compelled to vote.

The answer is, that in respect of this law they are vested with no discretion whatever, any more than the Board of Supervisors is vested with a discretion in respect to the auditing of a bill for the salary of a county officer fixed at a specific sum by law. Here the obligation is equally mandatory. The legislature has imposed a duty which does not involve the exercise of any discretion whatever.

The authorities are controlling upon this point (*The People v. Common Council of Brooklyn*, 22 *Barb.*, 404; *Green v. Common Council of Syracuse*, 29 *How.*, 491; *Commonwealth, &c. v. Select and Common Councils of Pittsburgh*, 34 *Penn.*, 496; *People ex rel. Record Commissioners v. Supervisors of New York*, 11 *Abb. Pr.*, 114; *School District No. 1 v. School District No. 2*, 3 *Wisc.*, 333; *State, &c. ex rel. Ordway v. Smith, Mayor, &c.*, 11 *Wisc.*, 65).

4. The observations already made are a complete answer to the suggestion that the writ should run to committees of the Common Council. Those instruments of the Common Council cannot compel the bodies of which they are the servants to perform a public duty.

It is clear, in every aspect, that the order directing the writ to issue, should be affirmed with costs.

CLERKE, J.—On the argument, the only points taken by the counsel for the corporation were: first, that no action upon the part of the Common Council was necessary to the creation of the stock in question; and second, that the Common Council owe no duty to the relators.

I. As to the first point, the act (*Laws of 1866*, p. 211, § 5) directs and authorizes the Mayor, Aldermen and Commonalty of the city of New York to create a public fund or stock, to be denominated "Market Stock," for the amount of seventy-five thousand dollars, and § 6 directs the comptroller of the city to prepare and issue said stock within thirty days after being required in writing so to do by the commissioners. What stock? The *said* stock! That is the stock which, in the preceding section, the Mayor, Aldermen and Commonalty of the city of

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New York are directed to create. The comptroller evidently can prepare and issue no other stock than that mentioned in the first section, and any action relating to any other would be null and void, and, of course, the stock would be utterly worthless.

II. As to the point that the Common Council has no duty to the relators: The language, no doubt, of the act, as we have seen, is, "The Mayor, Aldermen and Commonalty of the city of New York are hereby authorized and directed to create a public fund or stock," &c. The words Common Council do not appear in the act. The Common Council, however, constitute the only agency or instrumentality by which this behest of the supreme legislature can be obeyed. The Mayor, Aldermen and Commonalty can act in no other possible way in the premises than by and through the Common Council. They cannot compel the latter to do so. The Mayor, Aldermen and citizens generally, who, I suppose, constitute the Commonalty, may daily raise their voices in the loudest tones, to the honorable the Common Council, commanding them to create this stock, and the Common Council could laugh at them as they have laughed at the Commissioners. The only possible method by which the Common Council can be compelled to do so is, by application to this court, which alone can issue a mandamus capable of being enforced. This point has been frequently determined by authority. In the language of BRONSON, J., *McCullough v. The Mayor, &c., of Brooklyn* (23 *Wend.*, 458), the writ lies against the body upon whom the duty of putting the necessary machinery in motion is imposed. In *The People v. The Common Council of Syracuse* (20 *How.*, 491), the act of opening the streets was the act of the corporation, but the Common Council had to set the machinery in motion, and, accordingly, the writ was issued against them. The obligation was mandatory on them. They have no discretion in the matter as in ordinary cases of municipal legislation; they must obey the supreme legislature. See, also, *The Commonwealth v. Select and Common Councils of Pittsburgh*, 34 *Penn.*, 496; *Archbold's Practice of the Crown Office*, 239-250, and *Tapping on Mandamus*, 94, in both of which the early cases on this subject are collected.

The order should be affirmed, with costs.

BARNARD, P. J., concurred.

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INGRAHAM, J.—I concur in the propriety of granting this writ, were it not directed to the wrong parties.

The statute imposes the duty of creating the stock, on the Mayor, Aldermen and Commonalty of the city of New York. This is the corporate title of the municipal corporation. They act by the Common Council and the Mayor. No action of the one, without the consent of the other, can enact the necessary laws for creating the public stock, except in case of a veto from the Mayor. The mandamus directs the Common Council to enact the necessary law to create the stock. This they cannot do without the Mayor; and they are required to do what is not in their power.

I have no objection to a modification of the command in the writ, so as to require them to prepare and pass, in their separate boards, the necessary ordinance for that purpose, and, on complying with that direction, their duty in the matter is discharged.

In *The People v. The Common Council of Brooklyn* (22 *Barb.*, 404) the writ was so directed and allowed, but in that case the statute directed the Common Council of Brooklyn to do the act. So, in the case of *The People v. Common Council of Syracuse* (20 *How.*, 491), the statute directed the Common Council, after the award, to pay the money.

In *McCullough v. The Mayor of Brooklyn* (23 *Wend.*, 458), BRONSON, J., said, the proper remedy was a mandamus against the corporation to exercise their functions according to law.

Two things are necessary; the action of the Common Council, and the approval of the Mayor, before the law can be enacted.

If the writ had been directed to the corporation, it would have been their duty to pass the law; as it is, the remedy, at best, will be imperfect.

Order affirmed.

WHITE *against* JONES.*New York Superior Court ; General Term, November, 1863.*

INJUNCTION.—SIGNS AND TRADE-MARKS.—GOOD-WILL.

A retiring partner, who releases and assigns all his interest in the good-will of the business of the firm to his co-partner, does not thereby relinquish the right to establish and carry on a business similar to that of the late firm, so long as he does no act to mislead customers into the belief that he is carrying on business as the successor of the old firm ; or, that, when dealing with him, they are dealing with such successor.

Nor does one who was formerly bookkeeper of the late firm, and who, upon its dissolution, unites with such retiring partner in establishing such new business, thereby become liable to an action, by the purchaser of the good will, for an injunction or damages.

Where the conditions of dissolution were such that the retiring partner had the right to open, and attend to, for his own benefit, letters thereafter addressed to the late firm, upon certain subjects of business ;—*Held*, that the mere fact that he opened, and answered, in his own name, and for his own benefit, two fictitious or “decoy” letters, addressed to the late firm at the instance of the plaintiff, their successor, and purporting to be upon business which the former had not the right to attend to, did not authorize the court to interfere by action and injunction.

This was an appeal by the plaintiff, from a judgment in favor of the defendants.

The action was brought to restrain the defendants, who were Asahel Jones and Gilbert C. Platt, from alleged interferences with the business of the plaintiff, and for damages therefor.

The cause was tried before Mr. Justice ROBERTSON, without a jury, on the 15th of May, 1862.

For about four years prior to, and until the year 1860, the plaintiff, the defendant Jones, and one McCurdy, carried on in New York, Philadelphia, and elsewhere, the business of manufacturing and selling artificial teeth, and also instruments and articles used in dentistry, as partners, under the firm name, at first, of Jones, White & Co., and afterwards of Jones, White & McCurdy.

In the year 1860, McCurdy left such firm, and shortly afterwards, on the 18th day of December, 1860, the plaintiff, and the defendant Jones, entered into articles of copartnership, and subsequently carried on a similar business in the several cities mentioned therein, using in such business the firm name of Jones & White, until such new firm was dissolved, as hereinafter stated.

These articles provided, among other things, that the firm business should include the manufacture and sale of gold foil and plate, except in the city of New York, where that department of business was to be carried on as before by Jones, for his own benefit, exclusively.

For many years before the formation of the firm of Jones & White, and during its whole existence, Jones resided in New York, and exclusively superintended the business of such firm in New York, at No. 658 Broadway, and carried on the branch of business in gold foil and plate at the same place, exclusively for his own individual benefit; while White resided in Philadelphia, and had charge of the business in that city, at which most of the manufacturing of the firm was done.

About the 26th of June, 1861, the firm of Jones & White was dissolved by mutual consent, by an instrument in writing, the plaintiff, White, purchasing all the interest of the defendant, Jones, including "the good-will of the entire business." As a part of the consideration of this transfer, Jones agreed to take a large amount in the debts due the firm, contracted at, and due to, the New York house. The defendant, Platt, who had been the bookkeeper at the New York house, and well acquainted with its business and customers, was a subscribing witness to this agreement.

From the time of the dissolution of the firm of Jones & White, the plaintiff continued the business of such firm at No. 658 Broadway, as their successor. And, shortly after the dissolution, the defendant Jones established, in his own name, at No. 710 Broadway, several blocks, and upwards of an eighth of a mile distant, a new business, which was substantially similar in kind to the business previously conducted by Jones & White, at No. 658 Broadway, and continued such new business in his own name. The complaint alleged that the defendant Platt was interested in this business with Jones; but upon the trial it appeared that he was not, being only employed at a salary.

Such new business differed from the business carried on by

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the firm, previous to its dissolution, in this, that the defendant Jones sold teeth manufactured by other persons, but did not himself manufacture them, whereas the sales of teeth by such firm were principally of those manufactured by it.

The plaintiff, supposing that letters addressed to Jones, White & McCurdy, and containing orders and money for himself as their successor, were received and opened by the defendants, employed a detective officer connected with the United States postal service, who sent through the post office two letters addressed to the firm of Jones & White, which purported to be business letters, and one contained a sum of money to pay for goods for which it contained an order. These letters came to the hands of the defendant Jones, and he answered them by mail, over his individual signature. The envelopes in which his answers were sent, contained his individual business card, or address. To one of these letters the officer replied, in his fictitious name, saying: * * * "Your terms are all satisfactory, but "you do not state whose make of teeth they are: are they the "same as formerly, or a new make? I sent my letter to Jones & "White, but I suppose they have dissolved since I had any business with them, which is some time since, and I suppose you "carry on the business." * * *

In answer to this, the defendant Jones wrote: * * * "I "will send you, if ordered, my own teeth, and, if not satisfactory, will take them back. * * * Anything in the dental "line I can give—and I believe that twenty years' experience "in the dental business will be a sufficient guarantee of my "character in this line. I shall be happy to receive your favors."

In answer to the other of the decoy letters, the defendant Jones sent a package of the goods which it purported to require, by mail to the address specified therein, and enclosed therewith several envelopes with his individual address printed thereon, and also a bill of the goods as bought of him.

That package and its enclosure came afterwards, unopened, to the hands of the person by whom the decoy letter had been prepared and mailed, who was one of the employees of the post office, and the goods contained therein were, upon the application of the defendant Jones, restored to him, and he, thereupon, returned to such employee the sum of money which he had previously received for the same.

The judge found, as a fact, that "except as hereinbefore stated,

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neither of the defendants, since execution of said instrument of dissolution, have received, opened, or sent letters or envelopes containing orders for goods from customers of the late firm of Jones & White, or from others who had not previously dealt with it, which were directed either to Jones & White, or to Jones, White & Co., or to Jones, White & McCurdy, or any letters intended for Jones & White, or for the plaintiff, or their successor, or filled such orders, or sent goods as in such orders requested, or received moneys in payment therefor, or treated such orders as intended for them, or for said Jones.

And he found as conclusions of law:

First. That the "good-will" of the business of the late firm of Jones & White, and of the previous firms of which it was the successor, became, and was, by virtue of the articles of dissolution, the sole and exclusive property of the plaintiff, as successor of said firm.

Second. The defendant Jones has not, since the execution of said agreement, violated the covenants and provisions therein contained, on his part to be done and performed, nor interfered with, or infringed upon the said good-will of the former firm, now belonging to the plaintiff as aforesaid.

Third. That said defendant Jones had the right to open any letter addressed to the firm of Jones & White, respecting the debts due to the said partnership of Jones & White in New York, at the time of its dissolution, and the business of manufacturing and selling gold foil and plate, since the dissolution of the said partnership, and had the right to receive and open and answer any letters addressed to the said firm, which he did not have any reason to believe did not relate to such matters, if he did not open the same for the purpose of fulfilling orders therein contained, not relating to such matters.

Fourth. The defendant Platt is not in any manner a party to the articles of dissolution in the complaint set forth, and has not, since the plaintiff became entitled to the good-will of the business of the late firm of Jones & White, infringed upon, or in any manner interfered with such good-will.

And I do accordingly adjudge, that the plaintiff is not entitled to the injunction in the complaint prayed for, restraining the defendants, or either of them, as therein specified, or in any manner; and that the plaintiff has sustained no damages which he is entitled to recover against the defendants, or either of

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them, and that the complaint should be dismissed with costs to be adjusted, and the injunction heretofore granted herein against the defendants dissolved.

Judgment against White for costs was entered, from which the present appeal was taken.

Elbridge T. Gerry, and *William Curtis Noyes*, for plaintiff, appellant.—I. By the terms of the articles of dissolution an absolute vested right to the entire property of the concern, both real and personal, was conveyed to the appellant for a valuable consideration; and to prevent any misunderstanding as to the extent of property thus conveyed, “the good-will of the entire business” was specifically mentioned in the contract.

1. That “good-will” was partnership property, a legal subject of conveyance, and vendable to any one by all the partners; or by one to the other, as in this case (*Marten v. Van Schaick*, 4 *Paige*, 479; *Dougherty v. Van Nostrand*, *Hoffm. Ch.*, 68; *Smith v. Everett*, 27 *Beav.*, 446; S. C., 29 *Law Jour. Ch.*, 236; *Wedderburn v. Wedderburn*, 2 *Jurist [N. S.]*, 674; S. C., 22 *Beav.*, 84; S. C., 25 *Law Jour. Ch.*, 710; *Wade v. Jenkins*, 7 *Jurist [N. S.]*, 39; S. C., 2 *Giff. Ch.*, 509; S. C., 30 *Law Jour. Ch.*, 633; S. C., 3 *Law Times [N. S.]*, 464).

2. It was in the present case a definite interest, consisting in an advantage arising from the fact of sole ownership to the exclusion of other persons. It was embodied in the firm name which was essential to its use, and could neither perish nor be separated from it (*Story on Partn.*, § 99; 16 *Am. Jurist*, 87, *article by Prof. Greenleaf*; *Kennedy v. Lee*, 3 *Meriv.*, 452; *Coll- yer on Partn.*, § 161; *Williams v. Wilson*, 4 *Sandf. Ch.*, 379; *Smith v. Gibbs*, 25 *Law. Rep.*, 421; *Fenn v. Bolles*, 7 *Abb. Pr.*, 202; 2 *Lindley on Partn.*, 709–10).

II. There was an implied covenant by Jones in the transfer to White of all this property, that no act should be done by him to deprive White of the benefits accruing to him from such transfer.

1. By the articles of dissolution, the right was secured to Jones to carry on his manufacture and sale of gold foil, besides a reservation to him of certain debts due the old firm. They nowhere authorized any interference by, or right of Jones to any other portion of the business; and these reservations to him, on well settled legal principles, were an exclusion of all the rest

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(*Bennett v. Van Syckel*, 4 *Duer*, 462; 1 *Platt on Covenants*, 55, 57; *Selden v. Senate*, 13 *East*, 63; *Aulton v. Atkins*, 18 *Com. Bench*, 249; S. C., 2 *Jurist [N. S.]*, 812; S. C., 25 *Law Jour. Ch.*, 229; *Ward v. Audland*, 16 *Mees. & W.*, 862, 876, and authorities cited in *American edition*; *Cooper v. Watlington, Chitty*, 321; S. C., *sub nom. Cooper v. Watson*, 3 *Doug.*, 413, *in point*).

2. So that, although there is no express covenant in these articles by Jones not to set up any rival business, still one is implied, the good-will having been sold by him to White; and he had no right to give any notice, or do anything indicating that his was the old business, or which might interfere with White's enjoyment of it (*Crutwell v. Lye*, 17 *Vesey, Jr.*, 344; *Howe v. Searing*, 6 *Bosw.*, 370, *per MONCRIEF, J.*).

III. The facts in the case, proven by the evidence and found by the court, show conclusively a fraudulent infringement by the respondents of rights acquired by White in the purchase of the property, and for the protection of which this action was brought.

1. Long before the sale, but while it was in contemplation, Jones and Platt secretly combined to secure for themselves a lucrative business out of the transaction. (a) They first took lists of the customers of the firm, and then sought to induce the old clerks to leave White and go with them. (b) Then they prepared advertisements of their intended new business, procured a store close by that of the old firm, and before White got possession, Platt made arrangements in Philadelphia to furnish Jones and himself with materials like those used by the old firm. (c) All this was done secretly, White being ignorant of the matter, and supposing that the transaction between him and Jones was fair and honest. Indeed, he did not even suspect the purloining of his orders by Jones until the detectives suggested it.

2.* This fraudulent scheme of the respondents, which commenced before, was carried out by them subsequent to the sale. (a) The business of White greatly decreased, which can be attributed to no other cause. (b) Jones opened and read letters addressed to the old firm, which he had no right to do, under the pretence that his ownership of the debts of the old firm, secured to him on its dissolution, warranted such a course. Indeed, he admitted this to the detectives.

3. These facts bring the case completely within the rule of

Harrison v. Gardner, and show a deliberate fraudulent purpose when the contract of sale was made, to violate the understanding by which the property was transferred to White (Harrison v. Gardner, 2 *Madd. Ch.*, 197, 220 [*Am. Ed.*, p. 444], *per* SIB W. PLUMMER; Gale v. Gale, 19 *Barb.*, 249).

IV. Equity will intervene to restrain a vendor from fraudulently depriving his vendee of the benefits which would naturally result from the sale; and will compel him to refund profits which he has himself usurped, besides holding him responsible for damages resulting from the fraud (2 *Hovenden on Frauds*, 68, 240-1; Nickley v. Thomas, 22 *Barb.*, 652; Green v. Folgham, 1 *Sim. & S.*, 406).

V. The respondent, Platt, was a *particeps criminis*, combining with Jones to carry out his fraudulent intentions, and reaping his advantage in a percentage on profits fraudulently acquired. He is, therefore, jointly liable with Jones in damages, having joined in the commission of a tort, with full knowledge of the facts (2 *Hillyard on Torts*, 310, 311, and cases cited in notes; Longman v. Pole, *Moody & M.*, 223).

VI. The court below erred in not finding the facts set forth in the appellant's exceptions, which were fully sustained by the evidence, in excluding certain portions of evidence which were relevant and admissible to sustain the complaint; and, finally, in dismissing the complaint upon the facts proven, and dissolving the injunction previously granted.

Joseph H. Choate, for defendants, respondents.—I. The case made by the complaint is the only case before the court, and that is simply for a violation of the articles of dissolution. The transfer by one partner of the good-will of the firm business does not, without an express agreement to that effect, bar him from establishing and carrying on a similar business, in his own name, and from employing, as a stranger might do, in fair competition, all the legitimate modes of advertising and advancing the new business (*Davis v. Hodgson*, 25 *Beav.*, 177; *Cooke v. Collingridge, Jac.*, 623; *Crutwell v. Lye*, 17 *Ves.*, 346, 385; *Churton v. Douglass*, 1 *H. V. Johnson*, 176; *Snowdon v. Noah*, *Hopk. Ch.*, 347; *Bell v. Locke*, 8 *Paige*, 75; *Dayton v. Wilkes*, 17 *How. Pr.*, 510; *Howard v. Henriques*, 5 *Sandf. S. Ct.*, 725; *Howe v. Searing*, 6 *Bosw.*, 365; and *vid. Hitchcock v. Coker*. 6 *Ad. & El.*, 438, 446; *Elves v. Crofts*, 10 *Com. B.*, 241; *Harrison v.*

Gardner, 2 *Madd.*, 197 [*Am. Ed.*, p. 444]; *Shackle v. Baker*, 14 *Ves.*, 468). In *Williams v. Wilson* (4 *Sandf. Ch.*, 379), the injunction was probably made mutual by consent.

II. The defendant, Jones, never covenanted or agreed to refrain from carrying on the same business elsewhere—and the plaintiff has wholly failed to show any violation on his part of the articles of dissolution.

III. As to the letters. An examination of the partnership articles and the agreement of dissolution shows that about one-half of all the business done at its New York house by Jones & White consisted of Jones' private business in the manufacture and sale of gold foil and plate, and that this, at the dissolution, reverted to Jones. Also, that at the dissolution, all the debts due to the firm at its New York house became the sole property of Jones, and that the settlement of them was left to him. He had, therefore, undoubtedly the exclusive legal right, after the dissolution, as found by the court, to receive and open and keep all letters addressed to the firm relating to either of those subjects; and a right, in common with the plaintiff, to open and read all letters addressed to the firm, coming into his hands, for the purpose of ascertaining whether they were his or not. By a roguish device, for the purpose of entrapping the defendant into a seeming violation of his rights, the plaintiff, some four months after the dissolution, entered into a conspiracy with some of the clerks of the post-office, to get into the hands of the defendant counterfeit letters and orders to the firm, in the hope that, by inadvertence or otherwise, he might fill the orders, and so furnish the plaintiff some ground which he had not yet found on which to seek the interposition of a court of equity. The results of this dishonest manœuvre constitute the sole basis of the plaintiff's alleged grievances.

The acts of the defendant, in all these instances, even had they not been the result of inadvertence, which upon the evidence they clearly were, and had the transactions been genuine, are clearly shown in the opinion of ROBERTSON, J., to form no ground-work for the plaintiff's action.

But, further than this, in view of the plaintiff's connexion with all those transactions, it is obvious that all those letters were written and sent by the plaintiff to the defendant, with the intent that they should be opened and read, and the orders filled by him, and as the only means of effecting this, so that Jones

might inadvertently fall into the trap, to insert them in a box where none but his own letters were ever placed, and to get them into the hands of his messenger among a parcel of his letters, so that they might escape notice.

Moreover, it is equally obvious that by these transactions the plaintiff sustained no damage. Nobody was deceived. The Chillicothe customer and the Concord customer were none but the plaintiff; the money received by Jones in the one instance was refunded as soon as discovered; and in the case of the Cuba letter, the order and the profits of it belong by the agreement to Jones.

IV. But, in addition to the utter failure of merits, there are general rules of equity which imperatively required that the plaintiff's action should be dismissed, as it was.

1. Because it has been attempted to be brought within the jurisdiction of equity and of the court by a dishonest trick, but for which the plaintiff could not have stated in his bill a *prima facie* case. No court of equity will sanction an attempt by fraud or misrepresentation to bring a party or a cause within its jurisdiction. No plaintiff can successfully invoke the aid of equity unless his own hands are clean, and his own conscience pure in the business that brings him there.

2. Because he who seeks equity must show that he is ready to do equity; but the plaintiff's whole cause in the business has been inequitable and fraudulent; instead of seconding the efforts of the defendant to have his letters kept separate, he purposely contrives a plan to confuse the firm's letters with those of the defendant, in the hope that the latter in an unwary moment might open and answer some that did not belong to him.

3. Because equity will not relieve a man against grievances which he has brought upon himself; nor help him to relief to which he can perfectly well help himself. Had the plaintiff taken half as much pains to keep his letters out of the defendant's hands as he did to get them into them, he would have had no pretence for bringing his action.

4. Because the plaintiff's evidence shows that the grievance complained of no longer existed; before the trial the plaintiff had wholly ceased receiving letters directed to the firm.

V. As to the defendant Platt no evidence was offered. He had a plain right to choose his own master. He has no interest in the defendant Jones' business, and had no hand in any of the acts complained of.

BY THE COURT.—BOSWORTH, CH. J.—The sale by Jones to White, on the dissolution of their copartnership, of his interest in it, and “the good-will of the entire business,” did not deprive Jones of the legal or equitable right to engage in, and prosecute a similar business, in the vicinity of the place of business of the dissolved firm. This seems to be so well settled, that nothing more is necessary than to refer to some of the prominent cases, affirming this doctrine (*Crutwell v. Lye*, 17 *Ves. Jr.*, 344; *Davis v. Hodgson*, 25 *Beav.*, 177; *Churton v. Douglas*, 1 *H. V. Johnson*, 176; *Howe v. Searing*, 6 *Bosw.*, 354; *Dayton v. Wilkes*, 17 *How. Pr.*, 510).

The complaint does not allege that the defendant, in prosecuting his business at 710 Broadway, represents it to be the same business which the dissolved firm carried on at 658 Broadway, or that he is conducting business at 710 Broadway, as successor to the late firm of “Jones & White.” On the contrary, it avers that “Jones has established a similar business, in all respects, to that of the old firm, in his own name, * * and still continues to carry on such business in his own name, * * such business being, in all respects, similar to that conducted by the said firm of Jones & White.”

That Jones has opened letters, etc., directed to “Jones & White,” “Jones, White & Co.,” and to “Jones, White & McCurdy,” intended for the plaintiff; that such letters were from customers of the late firm of Jones & White, and contained orders for goods; and that Jones has filled said orders, and received payment for the goods ordered.

Judgment is prayed that Jones be enjoined from receiving or opening any letters or orders directed as aforesaid, or from filling the orders, or from, in any way, interfering with the business of the former firm, or the good-will thereof; and for damages.

The defendant has a right to establish and carry on, in his own name, a business similar to that of the late firm, so long as he does no act to lead customers into the belief that he is carrying on business as the successor of the old firm, or that, when dealing with him, they are dealing with White, or with the person succeeding to the business of the late firm of Jones & White.

To such loss of anticipated business or profits as the plaintiff may be subjected by the prosecution by Jones of a similar business, in his own name, conducted as the law will permit him to conduct it, the plaintiff must submit. If the good-will of the

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business of the dissolved firm should prove less valuable, by such means, than the plaintiff estimated, it is his misfortune, and the law will not undertake to indemnify him, by enjoining Jones from prosecuting a similar business.

The evidence offered to be given by the witness, Walker, was properly rejected. The conversation offered to be proved, is not stated in the offer to have been made in the hearing of the plaintiff.

The complaint does not allege that Jones, to induce White to enter into the contract of dissolution, represented that he did not intend to engage in a similar business in competition with, or in opposition to the plaintiff. It does not intimate the existence of any contract not evidenced by, or embodied in, the written contract of the 26th of June, 1861. It does not attempt to raise any question of fraud by White, in obtaining the execution of that written contract. The case made, and the right to the relief sought, are founded on the rights growing out of the agreement which that expression imports, and its supposed violation.

The complaint does not allege that Jones has issued circulars, or published advertisements, the continuance of which should be enjoined.

The only relief prayed for, not disposed of by the views already stated, is an injunction restraining the defendants from receiving and opening letters addressed as stated in the prayer for relief, and from filling the orders.

The evidence relating to this branch of the case warrants the findings of fact as found at special term.

The only misconduct charged in the complaint against Platt, besides the opening of orders intended for the plaintiff, and filling such orders, is his forming a partnership with Jones, in the business conducted at No. 710 Broadway, and continuing such partner, and interested in said business, having been the bookkeeper of Jones & White, well acquainted with its business, and those accustomed to deal with it, and knowing of the dissolution of that firm; the articles of dissolution and their contents, and having signed the same as a subscribing witness.

Except the allegation of opening letters and orders, and filling the orders, no misconduct is imputed to him in the complaint.

The facts found in respect to the matter last-named, do not authorize the court to interfere by action and injunction.

The judgment should be affirmed.

MARTIN *against* HOUGHTON.

*Supreme Court, Third District; General Term, September,
1865.*

DEFENSE IN TRESPASS.—LICENSE.—EVIDENCE.

A license to enter premises, upon which one has for years been in the habit of visiting, may be presumed.

Evidence as to the length of time a path had existed which was used for so entering is pertinent.

Of the evidence which will sustain a finding for the defendant in an action for trespass, in crossing plaintiff's premises after being forbidden.

Appeal from a judgment of the county court of Albany county, reversing a judgment of a justice's court.

The plaintiff, Jacob H. Martin, complained against the defendant, Jane Houghton, in trespass, for crossing his premises, *after the defendant was forbidden.*

The defendant interposed by her answer: first, a general denial; second, a license from the plaintiff to cross; third, that the public had a right to cross the path.

The action was tried before a jury, who rendered a verdict in favor of the defendant.

The additional facts appear in the following opinion.

The county court having reversed the judgment, the defendant appealed to the Supreme Court.

J. H. Clute, for the appellant.

Ira Shafer, for the respondent.

BY THE COURT.*—INGALLS, J.—It appears from the evidence of the plaintiff, that the defendant had been in the habit of coming upon the premises of the plaintiff for a series of years, and within the two years next prior to the trial, passed through

* Present, HOGEBOOM, MILLER and INGALLS, JJ.

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the door yard, some times upon one side of the house, and at other times upon the other side. There was a path, some part of the time, upon which the defendant traveled. The plaintiff testified that the defendant came to his house a number of times, but did not know and could not testify whether he had sent for her. That he forbid her crossing his place at different times, and she said she would go and did go. *That he told defendant she should not cross the path, but might cross along the stone wall.* That she afterwards *passed around the house*, and he then told her she should not cross his place at all. The defendant testified in substance that she had lived at her brother's since she was born, and that there had been a path from her brother's to the plaintiff's which she had traveled for thirty years. That the plaintiff forbid her going *on the path*, but gave her permission to go along the *stone wall*, and that she was going along the wall when the boy told her to go off the rye. That she had traveled that path in going to plaintiff's when his mother was sick. *That the families had been on intimate terms.* That she had seen the path ploughed up and a furrow ploughed for a path.

I think, from all the evidence, the jury were justified in finding that no trespass was committed by the defendant, upon the premises of the plaintiff, after she was forbidden to enter thereon. The plaintiff testified that the defendant had been in the habit of visiting his house, and would not swear that such visits were not by invitation. He testified that he told defendant she should not cross the path, *but might cross along the stone wall.* There is nothing in the evidence to *show where the stone wall was located*, or that in going around the house she did not go along the wall.

The evidence does not show at what period, after she was forbidden to cross the premises, she crossed the same, nor but that such crossing was along the stone wall. It is quite apparent that the families had been on friendly terms, and the defendant had been a welcome visitor at the plaintiff's house, and for a period of thirty years had been accustomed to travel upon the path spoken of.

It can hardly be inferred from the evidence that the plaintiff at the time he forbid the defendant crossing upon the path, and at the same time gave her permission to travel along the wall, supposed the defendant guilty of trespass for which he

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designed to hold her accountable. The jury were also justified, from the evidence, in finding that the defendant did not enter upon the premises in violation of the permission of the plaintiff, *after she was forbidden*. If inferences are to be indulged, they must be in support of, and not against proceedings in the justice's court; and where a party seeks to reverse a judgment he must show affirmatively that error has been committed, and that he has been prejudiced thereby.

The defendant interposed one defense, that the entry upon the premises was by the license of the plaintiff. To constitute a license which amounts to a defense to an action of trespass, there must be a permission to enter upon the premises, which may be express, or implied from circumstances, and it has been held that familiar intimacy between families may be evidence from which a general license for such purpose may be presumed (*Adams v. Freeman*, 12 *Johns.*, 408; *Syron v. Blakeman*, 22 *Barb.*, 336; *Haight v. Badgeley*, 15 *Barb.*, 502; *Pierrepoint v. Barnard*, 6 *N. Y.* [2 *Seld.*], 279).

In the last case the question of license is fully considered. Certainly, where a party has for years been in the habit of visiting the house of another without objection, a license will be implied: any other rule would be unreasonable and oppressive. In this case, the defendant for thirty years had exercised that privilege, the families being upon intimate terms, and upon this ground alone the jury would, in my judgment, have been justified in finding an implied license. The defendant's case, however, does not rest there: both plaintiff and defendant testify to an express permission to the defendant to pass along the stone wall, and the evidence does not show that the defendant entered the premises after that permission was revoked, nor that the defendant went elsewhere than along the wall after the permission was given.

I do not think a fatal error was committed in allowing the witnesses to testify in regard to the length of time the path had been there. That evidence was pertinent, upon the question of license, to ascertain how long the defendant had been in the habit of visiting the plaintiff's house, and by what way she went, with a view to show how marked and notorious had been the exercise of the privilege, as all these circumstances had a tendency to characterize the transaction, and were properly considered in determining the nature and extent of the per-

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mission relied upon to establish the license. It did not by any means follow that those facts bore necessarily upon a question of title.

Indeed, the evidence does not show that the defendant attempted to assert any title or absolute right to enter upon the premises. On the contrary, when the plaintiff forbid the use of the path, the defendant, by the permission of the plaintiff, went along the wall.

No principle is better settled than that a party may litigate a question of license in justices' courts (*Dolittle v. Eddy*, 7 *Barb.*, 75; *Ex-parte* Coburn, 1 *Cow.*, 568; 3 *Kent's Com.*, 452). The author says: "License is an authority to do a particular act, or series of acts, upon another's land, without possessing any estate therein. It is founded on personal confidence, and is not assignable, nor within the Statute of Frauds." See also *Pierrepoint v. Barnard* (6 *N. Y.* [2 *Seld.*], 279).

In reviewing proceedings of the justice's court great liberality is to be exercised, and a judgment is not to be reversed for a technical error which does not affect the merits (*Bort v. Smith*, 5 *Barb.*, 283; *Spencer v. S. & W. R. R.*, 12 *Barb.*, 382).

I am of opinion that the defendant established a license to enter upon the plaintiff's premises, which constituted a defense to the action, and that no error was committed by the justice, in admitting evidence which should reverse the judgment of the justice's court. The judgment of the county court must be reversed, and the judgment of the justice affirmed, with costs.

FRINK *against* THE HAMPDEN INSURANCE
COMPANY.

Supreme Court, Third District; General Term, September,
1865.

PARTIES.—INSURANCE.

Upon a policy of insurance against fire, issued to A., loss, if any, payable to B., the latter may maintain an action in his own name.

The cases of *Grosvenor v. Atlantic Fire Ins. Co.* (17 N. Y., 391); *Freeman v. The Fulton Fire Ins. Co.* (14 *Abb. Pr.*, 398); and *Fowler v. New York Indemnity Ins. Co.* (26 N. Y., 425), explained.

Appeal from an order of the court, at special term, overruling a demurrer.

The complaint alleged the defendants to be an incorporation, as an insurance company, under and by virtue of the laws of the State of Massachusetts; the application of one Richard Hurst, of the village of Cohoes, to the company, to be insured against loss or damage by fire, upon certain property owned by him, for the term of one year from the 1st day of August, 1863; that the defendants became insurers, setting out the certificate of insurance in full, "loss, if any, payable to J. W. Frink, as collateral," the destruction of the insured property, of the value of more than the amount covered by the policy, and all the requisite steps to charge the defendants; that previous to the issuing of the certificate, the plaintiff had loaned to Hurst his promisory notes, to an amount exceeding four thousand five hundred dollars, and which were in the hands of *bona fide* holders, and that he was still liable upon said notes to an amount exceeding the sum covered by the certificate; that said notes were out-standing, and unpaid; that in consideration of the premium of one hundred and twelve dollars and fifty cents, the defendants, at the request of Hurst, agreed to pay the loss, if any, to Frink, and the plaintiff therefore claimed to recover the

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amount of the loss. The defendants demurred generally, that the complaint did not state facts sufficient to constitute a cause of action.

S. Hand, for defendants.

Ira Shafer, for plaintiff.

BY THE COURT.*—MILLER, J.—It is not claimed that the plaintiff had any insurable interest in the property insured, but it is insisted that he was the appointee of Hurst, the insured, to receive the loss, if any was incurred, and hence is entitled to maintain this action.

In *Grosvenor v. The Atlantic Fire Ins. Co.* (17 N. Y., 391) the action was brought by the mortgagee, to whom the loss was payable, and it was held that he could not recover, because of a breach of the conditions of the policy by the mortgagor. The learned judge in this case held that the plaintiff was the appointee of the party insured, to receive the money that might become due from the insurers upon the contract. He says, "The undertaking to pay the plaintiff, was an undertaking collateral to, and dependent upon the principal undertaking to insure the mortgagor. The effect of it was, that the defendants agreed that whenever any money should become due to the mortgagor upon the contract of insurance, they would, instead of paying it to the mortgagor himself, pay it to the plaintiff.

"The mortgagor must sustain a loss for which the insurers were liable, before the party appointed to receive the money would have a right to claim it. It is the damage sustained by the party insured, and not by the party appointed to receive payment, that is recoverable from the insurers (*Macomber v. The Cambridge Mutual Fire Ins. Co.*, 8 Cush., 133)." He then proceeded to state that, "The insurance being upon the interest of the mortgagor, and he having parted with that interest before the fire, no loss was sustained by him, and of course, none was recoverable by his assignee or appointee."

The effect of, and the irresistible inference to be drawn from these observations, is, that but for the fact that the mortgagor had parted with his interest, and had sustained no loss,

* Present, HOGEBOOM, MILLER and INGALLS, JJ.

the plaintiff could have recovered as his appointee (see also *Bidwell v. Northwestern Ins. Co.*, 19 *N. Y.*, 179, 183).

The case above cited (17 *N. Y.*, 391), establishes that the loss being payable to another party instead of the insured, was merely a designation of the person to whom it was to be paid after it had accrued, and was not an assignment of the policy because payable to another.

In the case at bar it was an insurance of Hurst, and the plaintiff was the appointee to receive the money in the event of a loss by fire. It was only an agreement collateral to, and dependent upon the original undertaking, that *after* a loss had occurred and not *before*, the money should be paid over to the plaintiff, and was not an assignment of the policy before any loss. If the case of *Grosvenor v. The Atlantic Fire Ins. Co.* is a reliable authority, then it was not necessary for the plaintiff to allege in his complaint that he had an insurable interest, and the plaintiff to whom the loss was payable as appointee, can maintain this action, and unless there is some authority that overrules the doctrine laid down, it must be considered as conclusive in favor of the plaintiff's right to recover.

The defendants' counsel insists that there is such authority, and our attention has been particularly directed to the case of *Freeman v. The Fulton Ins. Co.* (14 *Abb.*, 398) which is mainly relied upon to sustain an adverse theory. In that case, one Stetson was the owner of the steamer "Cataline," at the time of the issuing of the policy, and the defendants insured the *plaintiffs, or whom it might concern, and the loss, if any, was payable to the plaintiffs.*

It was held that the complaint was demurrable, and that in order to recover upon a fire insurance policy for the amount of the loss, it must allege that the plaintiffs had an interest in the thing insured at the time of the loss; unless the claim was assigned to him afterwards, or he sues as trustee of an express trust, and if he sues as trustee or agent, the complaint should allege the existence of such trust, and show his authority to collect the amount insured.

To make the case cited parallel to the one at bar, Stetson should have been the insured party, and the loss payable to the plaintiffs. As it stands, the plaintiffs, or whom it might concern, were the parties insured. The plaintiffs had no in-

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surable interest, and Stetson was not insured, nor did it appear that the plaintiffs had acted as the trustees or agents of Stetson, the owner.

Entirely a different question was presented from the one now considered, and I think the authority last cited is not in conflict with 17 *N. Y.* And although referred to approvingly in *Fowler v. The N. Y. Indemnity Ins. Co.* (26 *N. Y.*, 425), yet I understand it was only for what it actually did decide, and not as sustaining a doctrine adverse to the former case.

The facts presented by the complaint here, do not show an assignment before loss to a party who had no interest in the property within the principle of several cases to which we have been referred (*Peabody v. Washington Ins. Co.*, 20 *Barb.*, 340; *Fowler v. New York Indemnity Ins. Co.*, 26 *N. Y.*, 423; *Ruse v. Life Ins. Co.*, 23 *N. Y.*, 516; *Hooper v. Hudson River Ins. Co.*, 17 *N. Y.*, 427; *Granger v. Howard Ins. Co.*, 5 *Wend.*, 202), but a case where the relation of insurer and insured existed between the defendant and Hurst, the owner of the property, until a loss had taken place, when the plaintiff, as the appointee of the insured, steps in and claims under the agreement that the defendants should pay the money to him.

There are several other points urged by the defendants' counsel, that cannot be upheld, if the views already expressed are sound and maintainable, and hence a discussion of them is not required.

My opinion is that the case of *Grosvenor v. The Atlantic Fire Ins. Co.* is a decisive authority upon the question discussed, and that the demurrer to the plaintiff's complaint was not well taken.

The order overruling the demurrer must be affirmed with costs, with leave to withdraw the demurrer, and put in an answer upon the usual terms.

SOLOMAN'S CASE.

Before Hon. A. D. Russel, City Judge, New York, June, 1866.

EXTRADITION.

In order to give the governor of a State jurisdiction to issue his warrant for the rendition, under the Constitution of the United States, of a fugitive from justice of another State, the fugitive must be demanded by the executive of the latter State, a copy of the indictment or affidavit before a magistrate charging the offence must be produced, and such copy must be certified as authentic by the executive.

An affidavit sworn before a justice of the peace, and a certificate by the executive, that he is such officer, and that his attestation is in due form, is not sufficient in this respect.

Habeas corpus.

Sidney H. Stuart, for the relator.

Van Voorst & Flanagan, opposed.

RUSSEL, J.—A *habeas corpus* was allowed, directed to the Commissioners of the Metropolitan Police—commanding them to bring before the city judge of the city of New York, at his chambers, Joseph A. Solomans, and O. Pahaloko, whom, it was alleged, they had in custody, and to exhibit the cause of their detention.

They were brought before him, and the officers returned that they had them in custody by virtue of a warrant, issued by the governor of this State; which return was traversed by the prisoners, and a copy of the affidavit on which the warrant was allowed, was annexed to said traverse: by which it appeared, that it was sworn to before a justice of the peace, in New Orleans, and there was a certificate of the secretary of State of Louisiana, certifying that he was a justice of the peace, and that his attestation was in due form of law.

The Constitution of the United States provides that a person *charged* in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State,

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shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime (*Constitution U. S.*, art. 4, § 2).

Congress has defined what forms of process are necessary to carry out or enforce that provision, and how the same are to be certified.

By the act of Congress framed February 12th, 1793 (1 *Brightly's Digest Laws U. S.*, 293) it is enacted: "Whenever
"the executive authority of any State in the Union, or of
"either of the Territories, shall demand any person as a fugitive
"from justice, of the executive authority of any such State
"or Territory, to which such person shall have fled, and shall
"moreover produce the copy of an indictment found, or an
"affidavit made before a magistrate of any State or Territory
"as aforesaid, charging the person so demanded with having
"committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged fled, it shall be
"the duty of the executive authority of the State or Territory
"to which such person shall have fled, to cause him or her to
"be arrested and secured, and notice of the arrest be given
"to the executive authority making such demand, or to the
"agent of such authority appointed to receive the fugitive;
"and to cause the fugitive to be delivered to such agent,
"when he shall appear."

This act is summary in its effect, and must be strictly complied with; otherwise, a warrant issued under it would be absolutely void.

In order to give the governor of this State jurisdiction, three things are requisite.

First. The fugitive must be demanded by the executive of the State from which he fled.

Second. A copy of an indictment found, or an affidavit made before a magistrate charging the fugitive with having committed the crime.

Third. Such copy of the indictment or affidavit must be certified as authentic by the executive. If all these prerequisites have been complied with, then the warrant of the governor was properly issued, and the prisoners are legally restrained of their liberty. We must look at the return to

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the *habeas corpus*, and the traverse, in order to ascertain whether these provisions have been complied with. By which traverse to said return it appears, and it is not denied, that an affidavit charging the said prisoners with getting money under false pretences, with the intent to cheat and defraud the firm of Harlam J. Phelps & Co., in New Orleans, in the State of Louisiana, was presented to the governor of the State of New York.

But it is denied, and appears from the certificate of the Secretary of State of New York, certifying to copies of said affidavit so presented to the governor as aforesaid :—

That said affidavits were not authenticated in accordance with the said act of Congress, by the executive of the State of Louisiana ; and consequently there has not been a compliance with the Constitution and laws of the United States, and the governor of the State of New York had no legal authority to issue his warrant to arrest the said prisoners, and to direct that they be delivered over to the agent of the State of Louisiana (9 *Wend.*, 220 ; 7 *Law R.*, 386). There are other questions raised on the face of the warrant of the executive of the State of New York, which it is unnecessary to pass on.

I am of opinion that the proceedings are irregular ; and that the prisoners are not legally in custody of the officers ; and do direct that they be discharged.

VAN DEUSEN *against* THE CHARTER OAK FIRE
AND MARINE INSURANCE COMPANY.

New York Superior Court ; General Term, May, 1863.

PROOFS OF LOSS.—DISMISSAL OF COMPLAINT.—INSURANCE
POLICY.

Where insurers received and examined the proofs of loss presented by the insured, and, in answer to subsequent inquiries on his part, whether there were any further proofs that he could show, or anything further was

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wanted of him, answered that there was not, and afterward offered to compromise the claim, but without making any objection to the proofs;—*Held*, that they could not defeat his action on the policy by objecting that the magistrate's certificate, which the policy required should accompany the proofs of loss, was never served on them.

A motion to dismiss the complaint, in such case, at the trial, upon the ground that the papers served on the defendants were not in compliance with the terms of the policy, does not authorize the defendant to raise the objection on appeal that the person on whom the magistrate's certificate was served, was not the authorized agent of the defendants to receive it.

Where a policy of insurance upon a stock of merchandise covered the goods sold but not delivered, and its printed condition provided that "in case of any transfer or termination of the interest of the insured in the property, by sale or otherwise, * * * the policy shall be void;" and "that in case of any sale, alienation, transfer or change of title in the property insured, * * * or of any individual interest therein, such insurance shall be void; and the entry of a foreclosure of a mortgage, or the levy of an execution, or an assignment for the benefit of creditors, shall be deemed an alienation of the property;"—*Held*, that the giving of a chattel mortgage upon the goods, without parting with the possession, or the right to possession, did not avoid the policy. The words "sale, alienation or transfer" should be construed to mean some act which divests the title absolutely.

Appeal by the defendant from a judgment in favor of the plaintiffs, entered on a verdict.

The action was brought upon a policy of insurance, and was tried before Mr. Justice MONCRIEF, and a jury, on December 5th, 1862.

By the policy, the defendants insured the plaintiff, Alonzo Van Deusen, "against loss or damage by fire to the amount of five thousand dollars, on merchandise hazardous and not hazardous, his own, or held by him in trust or on commission, or sold, but not delivered, contained in the brick and stone building situate No. 40 Murray street, city of New York."

It contained a clause declaring that "no part of this contract can be waived, except in writing, signed by the secretary."

Among the conditions of the policy, were the following:

"III. Property held in trust, or on commission, must be insured as such; otherwise, the policy will not cover such property; and in case of loss, the names of the respective owners shall be set forth in the preliminary proofs of such loss, together with their respective interests therein. Property on storage must be separately and specifically insured.

"If the interest in property to be insured be a *leasehold*, or any other interest not absolute, or if it be equitable, it must be so represented to the company in writing, with the true title of the insured, and the extent of his interest, and so expressed in the policy in writing, otherwise the insurance shall be void. And this policy shall not be construed to protect the interest of any person not named herein :

"[NOTE.] By 'property held in trust' is intended property held under a deed of trust, or under the appointment of a court of law or equity, or property held as collateral security ; in which latter case, this company shall be liable only to the extent of the interest of the assured in such property.

"IV. This policy, or any claim arising under it, shall not be assigned, transferred, pledged or sold, either before or after a loss, without the consent of the company, expressed by indorsement, made thereon. In case of assignment, transfer, pledge or sale, without such consent, whether of the whole policy, or of any interest in it, the liability of the company, present and future, shall then cease. And the company reserves the right to elect, either to consent to a transfer before a loss, or return a ratable proportion of the premium and cancel the policy. And in case of any sale, alienation, transfer or change of title in the property insured by this company, or of any undivided interest therein, such interest shall be void, and cease. And the entry of a foreclosure of a mortgage, or the levy of an execution, or an assignment for the benefit of creditors, shall be deemed an alienation of the property.

"In case of claim for loss or damage on a policy assigned, where there is no actual sale or transfer of the property insured, proofs of loss shall be made by the assured in conformity with the conditions of this policy, the same as if no assignment had been made ; otherwise this policy shall be void, and all liability on the part of this company shall cease."

The eighth condition also contained a provision that the insured should, in case of loss, deliver an account and proofs thereof to the defendants, and should, also, "produce a certificate under the hand and seal of a magistrate, notary public, or commissioner of deeds (most contiguous to the place of the fire, and not concerned in the loss, as a creditor or otherwise, or related to the insured or sufferers), stating that he has examined the circumstances" attending the loss alleged, and he is acquainted with

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the character of the claimants, and that they have * * sustained loss to a specific amount.

The goods insured were almost wholly destroyed by fire on the 5th day of December, 1861. The plaintiff's loss was eleven thousand one hundred and sixteen dollars and seventy-nine cents. Upon the trial, Elisha Peck, the agent of the defendants in the city of New York, testified that immediately after the fire he wrote to the defendants to send somebody down to look after it, and they sent their agent, Chapman (who heard of the fire a day or two after it occurred), to examine into the circumstances. He arrived in New York on the 9th day of December, went to the scene of the fire with Peck, and made a critical examination, and examined the plaintiff's books of account.

On the 10th Chapman asked the plaintiff for his proofs of loss, and the plaintiff gave to him the paper containing them, which Chapman took to the office of the defendants, in Hartford, Connecticut, and the defendants produced it on the trial. The plaintiff and another witness, testified that two or three days after this, and before Chapman left the city, the plaintiff asked him "*if there was anything further he could do, anything further they wanted of him.*" The reply, was there was not; if there was, they would let him know."

After the plaintiff rested, the defendants' counsel moved to dismiss the complaint, on the ground that the paper served on the defendants as above was not in compliance with the terms and conditions of the policy, as a prerequisite to the right to recover.

The court denied the motion; to this denial and decision the defendants' counsel excepted.

In the proofs of loss it was stated that "said property was, at the time of said fire, subject to a mortgage, executed by the deponent to Mark R. Van Deusen, of the town of Alford, Berkshire county, Massachusetts, dated July 6th, 1861, and filed in the Register's Office for the city and county of New York, and numbered 10,223, and which contained the condition that the deponent 'should pay the holders thereof when due, or cause to be paid, all promissory notes which (then) have been or hereafter may be made and signed by the party of the first part (deponent) as principal, and indorsed or signed as surety by the party of the second part' (mort-

gagee). That there is no other mortgage or incumbrances on said property."

The counsel for defendants offered in evidence the chattel mortgage mentioned in the proofs of loss, to show an alienation, transfer, or change of title, in the property insured; and it was admitted, against plaintiff's objection and exception. It did not appear that the mortgagee ever had the right to take possession, or had actually entered into possession of the property. A certificate of a notary was made and delivered to Elisha Peck, on the 13th day of December, and he sent it to the home office, a day or two after he received it; but the president of the defendants testified that they never received it. The plaintiff, before the commencement of this action, called upon the defendants for payment of his claim, and they refused; but finally offered to pay a portion of it, by way of compromise. There was no evidence that they ever requested further proofs, or objected to payment on the ground that the proofs were defective, or intimated that the plaintiff had not complied with the terms and conditions of the policy.

The defendants' counsel requested the court to charge the jury, that, by the terms of the policy, there could be no waiver, except in writing, signed by the secretary; also that the chattel mortgage put in evidence showed that there was such a sale, alienation, transfer, or change of title, in the property insured by defendants, as rendered the insurance void, and it ceased. The court refused so to charge, to which ruling the defendants' counsel excepted.

The jury rendered a verdict for plaintiff for five thousand two hundred and fifty-four dollars and seventy cents; and judgment having been entered, the defendants appealed.

Henry C. Pratt, for defendants, appellants.—I. The court erred in not dismissing the complaint. The plaintiff alleges performance of all the conditions on his part. The conditions of the policy required plaintiff to produce, with his proofs of loss, a formal certificate in regard to certain specified facts. None such was produced. No evidence on the part of plaintiff shows a performance. Nor does it show a waiver of such certificate under the terms of the policy. Nor is a waiver a performance.

II. The court erred in not charging the jury, as requested,
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that there could be no waiver, except in writing signed by the secretary.

III. The court erred in not charging the jury, as requested, that the chattel mortgage rendered the insurance void. That mortgage was a sale and transfer to the mortgagee, of the whole legal title to the goods and chattels mortgaged, being "the property insured" (*Bank of Rochester v. Jones*, 4 *N. Y.* [4 *Comst.*], 497, 507; *Butler v. Miller*, 1 *N. Y.* [1 *Comst.*], 496, 500; *Southworth v. Isham*, 3 *Sandf.*, 448; *Hull v. Carnley*, 2 *Duer*, 99, 106; *Rich v. Milk*, 20 *Barb.*, 616; *Stewart v. Hanson*, 35 *Maine*, 508; *Shuart v. Taylor*, 7 *How. Pr.*, 251, 254). Thereupon, by plaintiff's own act, the policy and insurance were made void, of no effect, and ceased (*Edmonds v. Mutual Safety Fire Ins. Co.*, 1 *Allen*, 311; *Abbott v. Hampden Mutual Fire Ins. Co.*, 30 *Maine*, 414; *Orrell v. Hampden Fire Ins. Co.*, 13 *Gray*, 431).

T. D. Pelton, for plaintiff, respondent.—I. The defendant might waive a compliance with the conditions in the policy relating to preliminary proofs, either expressly or by implication, and there is no requirement in the policy, that the waiver should be in writing, and signed by the secretary. In this case, a waiver may be implied from either of the following facts.

1. From the declaration of the defendants' agent (*Franklin Ins. Co. v. Coates*, 14 *Md.*, 285; *Clark v. New England Ins. Co.*, 6 *Cush.*, 342; *Conover v. Mutual Ins. Co.*, 3 *Den.*, 254).

2. From the silence of the defendants touching the proofs (*Ætna Fire Ins. Co. v. Tyler*, 16 *Wend.*, 400; *Savage v. The Corn Exchange Ins. Co.*, 4 *Bosw.*, 1; *Bilbrough v. The Metropolitan Ins. Co.*, 5 *Duer*, 587; *O'Niel v. The Buffalo Fire Ins. Co.*, 3 *N. Y.* [3 *Comst.*], 122; *Kernochan v. The Bowery Ins. Co.*, 17 *N. Y.*, 428; *Child v. Sun Mutual Ins. Co.*, 3 *Sandf.*, 26, 42; *Vos v. Robinson*, 9 *Johns.*, 192; *Clark v. The New England Mutual Ins. Co.*, 6 *Cush.*, 342; *Underhill v. The Agawam Ins. Co.*, *Id.*, 440; *Heath v. The Franklin Ins. Co.*, 1 *Cush.*, 257, 264; *Inland Ins. Co. v. Stauffer*, 33 *Penn.*, 397; *Allegre v. Ins. Co.*, 6 *Harr. & J.*, 408; *Angell on Ins.*, §§ 242, 249).

3. From the negotiations and offer of the defendants to pay a part of the claim (*Bodle v. The Chenango Ins. Co.*, 2 *N. Y.*

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[2 *Comst.*], 53; *McMasters v. The Western Ins. Co.*, 25 *Wend.*, 379; *Westlake v. St. Lawrence Ins. Co.*, 14 *Barb.*, 206, 212).

II. The object of the condition requiring preliminary proofs, was fully secured to the defendants (*Lawrence v. Ocean Ins. Co.*, 11 *Johns.*, 241; *Barber v. Phoenix Ins. Co.*, 8 *Id.*, 318).

III. The proofs having been accepted without objection, it is immaterial whether they were in compliance with the terms and conditions of the policy or not. And the motion to dismiss the complaint was made upon a specified ground (*Boyn-ton v. Clinton &c. Ins. Co.*, 16 *Barb.*, 254; *Bumstead v. Divi-dend Mutual Ins. Co.*, 12 *N. Y.* [2 *Kern.*], 90).

The mortgage put in evidence by the defendants was not such an alienation as rendered the insurance void (*Shepard v. The Mutual Ins. Co.*, 38 *N. H.*, 232; *Jackson v. Massachusetts Fire Ins. Co.*, 23 *Pick.*, 418; *Conover v. The Mutual Ins. Co.*, 3 *Den.*, 254; *Angell on Ins.*, § 58, 205; 1 *Philips on Ins.*, § 286).

By THE COURT.*—BOSWORTH, CH. J.—The objection that the preliminary proofs did not contain a certificate of a magistrate, as required by the eighth of the conditions annexed to the policy, cannot be first taken at the trial (*Bilbrough v. Metro-polis Ins. Co.*, 5 *Duer*, 587; *O'Niel v. The Buffalo Fire Ins. Co.*, 3 *N. Y.* [3 *Comst.*], 128).

The objection to these proofs, taken on the motion to dismiss the complaint, was that "the paper served on the defendants, as above, was not in compliance with the laws and conditions of the policy, as a prerequisite to the right to recover." The terms of the objection not only do not raise any question whether the person on whom the service was made, was a proper person for the purpose, but import that he was.

The plaintiff had testified that "either Bowers (the presi-dent of The City Fire Insurance Company, which had also in-sured the same property), or Chapman (the defendants' agent), asked for the proofs of loss, and I went and got them, and handed them to them, and they examined the proofs; * * two or three days afterward we had a conversation, and I then asked 'if there was anything further that I could do; any further proofs that I could show on the case; anything further they wanted of me;' they said there was not; if so, they would let me know." * *

* Present BOSWORTH, CH. J., MONCRIEF and WHITE, JJ.

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The defendants, by their authorized agent, Elisha Peck, subsequently offered to settle and compromise the claim; but no complaint or intimation of the insufficiency of the preliminary proofs was at any time suggested.

On such a state of facts, the rule stated in *Bodle v. The Chenango Mutual Ins. Co.* (2 *N. Y.* [2 *Comst.*], 57, 58), should be applied, and the defect be held to be waived.

The only other question of substance relates to the effect of the giving of the chattel mortgage.

The policy declares that, "in case of any transfer or termination of the interest of the insured in the property, by sale or otherwise, * * the policy shall be void."

The fourth condition declares that, "in case of any sale, alienation, transfer, or change of title in the property insured, * * or of any individual interest therein, such insurance shall be void. And the entry of the foreclosure of a mortgage, or the levy of an execution, or an assignment for the benefit of creditors, shall be deemed an alienation of the property."

The giving of the mortgage would not avoid the insurance, as being an "*alienation, sale, or transfer* of title, within the meaning of the policy. The mortgagee did not take actual possession, and had no right to do so, until the plaintiff made default in payment of the moneys secured thereby (*Conover v. The Mutual Ins. Co. of Albany*, 1 *N. Y.* [1 *Comst.*], 290; *Rice v. Tower*, 1 *Gray*, 426).

Does the giving of the mortgage make a "change of title," within the meaning of the policy? If it does, then, if the goods were mortgaged when insured, payment of the mortgage before the loss, would also work a change of title." Such a construction makes the words equivalent to *alteration or modification of the nature of the title*.

I think the words "change of title," as used in this policy, should be construed to mean some act, which *divests it* absolutely; and thus permit the words, "the entry of the foreclosure of a mortgage" to have a natural, and not a forced application.

Construing the whole as permitting the insured to mortgage, where he retains possession, and has the right to possession, without avoiding the policy, then the same effect is given to an entry to foreclose the mortgage, as to the levy of an execu-

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tion; either of which the parties agree shall be deemed an alienation.

Any other construction would restrict the the application of the words, "the entry of a foreclosure of a mortgage" to goods mortgaged when the policy was issued, and would defeat the policy by reason of the mere fact of paying the mortgage prior to a loss.

For whatever change of title is effected by the mere execution of a mortgage, a corresponding change is produced by satisfying it.

Orrell v. Hampden Fire Ins. Co. (13 *Gray*, 431) is not an authority to the point, that a mortgage is a change of title, within the meaning of a policy, written like the present. The concluding part of the opinion (2) is, that to constitute a breach of the condition of insurance, "there must have been an actual sale or transfer of property, valid as between the parties." All else that is said, is qualified by the word "perhaps," and does not touch a point in judgment.

In Abbott v. Hampden Mutual Fire Ins. Co. (30 *Maine*, 414), one article of the defendants' by-laws was, that the policy should be void if the assured should sell or alienate the property in whole or in part, without consent of the company. The conveyances in that case were held to be an alienation in part. This case, therefore, has not much application to the case before us.

In Edwards v. Mut. Safety Fire Ins. Co. (1 *Allen*, 311) the by-laws provide that "all alienations and *alterations in the ownership*, situation or state of the property insured by this company, in any material particular, shall make void any policy covering such property." A subsequent mortgage of the property was said to be "an alteration in the ownership." * * It introduces a new owner to the extent of the sum secured by the mortgage, and to the same extent it takes away the direct interest of the assured." That case may be conceded to be correctly decided upon the particular facts of the case, and yet not be an authority in support of the proposition that a mortgage, though not due, and not giving the mortgagee a right to the possession of the property, makes "a change of title" within the meaning of the policy in the case at bar. In neither of the three cases last cited, does there appear to be any clause in the by-laws to the effect that "the entry of the foreclosure of a mortgage shall be deemed an alienation."

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Within the good sense and spirit of the terms of the body of the policy, and of the fourth condition, the words, "any sale, alienation or transfer" should be construed as applying to acts which terminate the interest of the assured. By the body of the policy, property "*sold*, but not *delivered*," is insured. This shows that "sale" means an executed contract of sale, which has transferred the title. Applying the maxim, *noscitur a sociis*, to the words "change of title," and keeping in mind the further provision that "the entry of the foreclosure of a mortgage" shall be deemed an alienation, the conclusion is reasonable, and, I think, clear, that the change of title here meant is a termination of it; and that the giving of the mortgage no more worked a change of title, within the meaning of the policy, than it did a transfer or alienation. That it is not an alienation within the meaning of the policy, is settled.

If these views are correct, the further questions involved in the other exceptions taken need not be considered, and the judgment should be affirmed.

Ordered accordingly.

STRONG *against* STRONG.

New York Superior Court; Special Term, June, 1866.

MOTION FOR ALLOWANCE TO WIFE IN DIVORCE.

As a general rule, when an action for divorce is brought against the wife, and she, in her answer, either denies her guilt, or sets up affirmative defences, such as forgiveness or recrimination, or does both, counsel fees and alimony will be allowed her, unless the court is satisfied that she is altogether in the wrong, or has no reasonable ground of defence.

The fact that on a trial had by a jury, on issues framed, involving a denial, forgiveness and recrimination, the jury disagreed, is enough to show that she has reasonable ground of defence, without the positive affidavits of the wife and of witnesses usually required on motions for such allowance.

An application to the favor of the court should not be denied on the ground that the moving party is in contempt of another court.

Motion by defendant to compel payment to her counsel by the plaintiff, of a sufficient sum to meet the expenses of a re-trial of the case, and to stay such re-trial, until the same should be paid.

The affidavit of one of the defendants' attorneys, after stating the existence, in his judgment, of a good defence upon the merits, stated that this action was brought by the plaintiff to obtain a divorce from the defendant, who at the time resided in the city of New York, and that the defendant by her answer denied the allegations of the complaint, and alleged grounds for a divorce in her favor against the plaintiff, and prayed affirmative relief.* That the issues were brought on for trial in this court before Justice GARVIN, and a jury, November 23d, 1865; that such trial occupied several weeks, and terminated December 31st, 1865, when the judge discharged the jury because they declared themselves unable to agree. That in the course of the trial, nineteen witnesses were examined for the plaintiff, and forty-five for the defendant; that, subsequent to the discharge of the jury, the plaintiff's attorney served notice of re-trial, and one of the attorneys for the plaintiff has been heard to avow their intention of pressing a re-trial, but no such notice of re-trial has been served by the defendant; that the separate estate of the defendant is small, and wholly inadequate to defray the necessary expenses of another trial of this action; that heretofore, no alimony, allowance or counsel fee, has been applied for against, or paid by the plaintiff; nor has he paid anything for her support, or that of her infant daughter, about six years old.

The affidavit of the defendant's brother stated that he was acquainted with the facts of the case; that the private and separate estate of the defendant does not exceed five thousand dollars, which amount has already been expended in the payment of fees to counsel, and necessary incidental legal expenses attending the late trial, which was advanced by her father; that the defendant has not pecuniary means to meet the expenses of a new trial, which the plaintiff is seeking. He is informed, and believes that the plaintiff, Strong, is not engaged in any profession or mercantile business, but is a man

* See *ante*, 233, where the case is reported.

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of wealth, and of independent pecuniary resources, and able to pay the expenses of the defendant, as well as of the prosecution of the action.

The plaintiff has admitted himself possessed of five thousand dollars, yearly income. He has not had the charge of any one but himself and child of twelve years. That he resides with his mother, a woman of large wealth, and that upon her death, she being now seventy years of age, he is entitled to his share of a large amount of property. Since the last trial, no attempt has been made by the defendant's attorney to come to a re-trial.

In opposition to the motion, the plaintiff's own affidavit was read, alleging that a *habeas corpus* in the Supreme Court had been sued out by him on the 4th of June, 1864, to compel the defendant to deliver to him the child in question, but that she had absconded with it, and ever since has remained concealed without the State; that the supplemental answer was not interposed until a year after the action was commenced, that efforts have been made by the members of both families to have the issues tried by reference or arbitration, that the defendant could not have known of the acts of adultery, charged in the supplemental answer, and that upon the trial the evidence of them was conflicting and improbable; that he is not a man of wealth, nor able to pay the expenses of both sides of this litigation, that his entire income is less than four thousand dollars a year, and that he receives no income from his father's estate.

In addition, there was a card read, signed by some of the jurors on the trial, stating how they stood when they were discharged.

Elbridge T. Gerry, and John McKeon, for the motion.—I. There being no verdict rendered in the case, individual opinions of jurors are of no moment (*People v. Camel*, 1 *Park. Cr.*, 256; *People v. Wilson*, 8 *Abb. Pr.*, 137; *People v. Hartung*, *Id.*, 132; *Barring'on on Statutes*, 20).

II. Any formal affidavit of innocence is unnecessary. A valid defence, recrimination, is set up, and the court, as *custos morum*, is bound to uphold every impediment in the way of a divorce (*Osgood v. Osgood*, 2 *Paige*, 621).

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III. Almost as of course, a wife is entitled to alimony, and the expenses of her suit in a suit between herself and husband, out of his property, when her own is inadequate to defray the incidental expense (*Brey v. Brey*, 1 *Hagg. Ecc.*, 168, *note*; *D'Aguilar v. D'Aguilar*, *Id.*, 787; *McKenzie v. Rhodes*, 13 *Abb. Pr.*, 339; 3 *Rev. Stat.* [5th ed.], 289, § 72; *Lovedon v. Lovedon*, 1 *Phill.*, 209; *D'Oyley v. D'Oyley*, 29 *Law. Jour. [N. S.] P., M. & A.*, 165; *Stanfred v. Stanfred*, 1 *Ed. Ch.*, 317; *Hammond v. Hammond*, 1 *Clarke Ch.*, 153; *Wood v. Wood*, 2 *Paige*, 113; *Williams v. Williams*, 3 *Barb. Ch.*, 628; *Halloch v. Halloch*, 4 *How. Pr.*, 160; *Fowler v. Fowler*, 4 *Abb. Pr.*, 411).

IV. Mrs. Strong has never been guilty of contempt towards this court, and with supposed contempts before other tribunals this court has nothing to do (*Passmore Williamson's Case*, 26 *Penn. St.*, 9). The *habeas corpus*, and proceedings resulting from it, were parts of the legal machinery employed at the outset of the suit, to prejudice her rights in court.

V. So the offer to try the cause before a referee, under the pretence of avoiding public exposure, is another artifice, and one designed to deprive her of a constitutional right (4 *Macq. H. of L., cas.* 162, *in point*).

VI. The motion should be granted unconditionally.

Henry A. Cram, opposed.—I. Alimony is not granted as matter of right, but purely as favor, and it will not be granted when no reasonable chance of success of the applicant is shown (*Moon v. Moon*, 1 *Atk.*, 276; *Watkins v. Watkins*, 2 *Id.*, 96; *Carpenter v. Carpenter*, 19 *How. Pr.*, 539).

II. Nor is alimony granted when innocence of the applicant is not averred under oath. Her absence from the State is a frivolous excuse for the non-presentation of such an affidavit on this motion (*Osgood v. Osgood*, 2 *Paige*, 161; *Wood v. Wood*, *cited in note*).

III. The contempt committed by her violation of the writ of *habeas corpus*, is an answer to this motion, and any order should be conditioned on her bringing the child she now has within the State, or on her consent to try the case before a referee.

IV. It does not appear that her separate estate is yet exhausted (*Morrill v. Morrill*, 2 *Barb. S. Ct.*, 481).

JONES, J.—I think it may be regarded as a general rule that when an action for divorce is brought against the wife, and she,

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in her answer, either denies her guilt, or sets up affirmative defences, such as forgiveness or recrimination, or does both, counsel fees and alimony will be allowed her, unless the court is satisfied that the wife is altogether in the wrong, or has no reasonable ground of defence, in which case, the court, in the exercise of a sound discretion, may refuse counsel fee and alimony.

The numerous cases cited on the argument do not impugn this general rule; some of these cases merely show what matters the courts have considered to be sufficient to show that the wife is altogether in the wrong, or has no reasonable ground of defence, while others show that under the circumstances detailed in them, the court will hold that the wife has a reasonable ground of defence, and that she is not altogether in the wrong.

Thus, some of those cases hold that if the wife do not deny her guilt under oath, or do not either swear positively to the allegation constituting her affirmative defences, or prove those allegations by the oath of persons having positive knowledge thereof, then the court will say that either the wife is altogether in the wrong, or has no reasonable ground of defence. Other of the cases hold that if the wife denies her guilt under oath, or positively swears to the allegation in her answer constituting affirmative defences, then, although affidavits may be produced contradicting her positive oath of innocence, or contradicting her positive oath as to the affirmative defences, still the court will be satisfied either that she is not altogether in the wrong, or that she has a reasonable ground of defence. One case intimates that although the wife may not be able to swear to her innocence, and may be able to swear only on information and belief to the allegations constituting her affirmative defences, yet if she produces the positive affidavits of those who know the facts constituting such affirmative defences, then the court will be satisfied that she has a reasonable ground of defence.

In the present case, the defendant, by her original answer, denies her guilt, and sets up, as an affirmative defence, forgiveness by the plaintiff. This answer is not sworn to. By her supplemental answer she sets up, as an affirmative defence, adultery committed by the plaintiff. This answer has the usual verification required by the Code. By this verification she does not swear positively that the recriminatory charges made by her are true of her own knowledge. Indeed, the affidavit which is made on which to found the motion for leave to file a supple-

mental answer, clearly shows that the only knowledge she had of the recriminatory charges was from information given by others, which information she believed to be true. She has never sworn to her innocence, nor to forgiveness by the plaintiff. From this statement it is evident that if the application had been made before trial, upon the complaint, answer and supplemental answer, it must have been denied under the authority of the cases cited on the argument.

The question now presents itself whether the fact of a trial having been had by a jury, on issues framed, which resulted in a disagreement, can, under any circumstances, take the case out of the rule which obtains on motions before trial, that if a wife neither swears to her innocence, nor having set up, as an affirmative defence, recriminatory charges on information and belief, which are denied on oath by the husband, brings to support those allegations, affidavits of witnesses who knew the facts, alimony and counsel fees will be denied.

I think it can, and not only that, but can bring the case within that other rule which obtains in motions of this character made before trial, viz.: that although a wife may be unable to swear to her innocence, and may be able to swear in her answer to recriminatory charges on information and belief only, yet if she bring the positive affidavits of those who of their own knowledge know the facts constituting the recriminatory charges, alimony and counsel fees will be allowed, although the husband denies the charges against him under oath.

If the evidence adduced at the trial and its effect on the jury is such as to show the court that there was positive evidence in support of the recriminatory charges, given by witnesses who of their own knowledge knew the fact, and the jury disagreed, then the wife, on motion after judgment, stands in the same (if not better) position than she would on a motion made before trial founded on the affidavits of the witnesses, embodying therein the matters testified to by them on the trial.

The defendant in this case occupies this position. There was affirmative evidence adduced in support of the recriminatory charges against plaintiff by parties who professed to know the facts of their own knowledge. This matter was litigated, as well as all others. The jury disagreed. Throwing out of consideration the card of the jurors—which, being a mere *ex parte* statement, not under the sanction of an oath, should have no influ-

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ence on the decision of this motion—it is impossible to say on what issue the jury disagreed, or how they stood. For aught the court knows, they disagreed on the issue of the recriminatory charges, and on that stood eleven for the defendant against one for the plaintiff. In such case the court cannot say she has no reasonable ground of defence.

But let us consider the card of the jurors. By that it appears that the disagreement was on the recriminatory charges, and that the jury stood two for the defendant against ten for the plaintiff. If she, on the past trial, has been able to produce such proof of the truth of her recriminatory charges as to cause two of the jurors to believe them to be true, the court cannot say but that she may ultimately succeed in causing the whole twelve to believe them true.

Defendant, in my view, stands in a far better position than if she had made her motion before trial on *ex parte* affidavits made by the persons whom she called on the trial to prove her recriminatory charges. If in such case she would be allowed alimony and counsel fees, notwithstanding the denial on oath by her husband (see *Osgood v. Osgood*, 2 *Paige*, 161), she should now be allowed them, after those persons have given their testimony orally, and been cross-examined with the result of impressing two jurors with the truth of their statements.

All the cases cited on the argument were cases of motions before trial. I think they have no application to this case, and, under all the circumstances, I feel I would not be warranted in holding that defendant has no reasonable ground of defence.

But it is urged that the story told by the witnesses who swore in support of this defence is too improbable to be believed. Yet at least two of the jurors, who were sworn well and truly to try the issues, and give a true verdict according to the evidence, not only considered it probable but believed it to be true. It cannot be answered that they were recreant to their oath; on the contrary, it must be assumed that such was their honest opinion. The fact that ten jurors believed otherwise can have but little weight. Men's minds run in different channels.

Although the minds of these ten were so differently constituted from the minds of the two as to lead them to a different conclusion, yet I cannot undertake to say that on the

next jury summoned from the inhabitants of this large city, the minds of the whole twelve may not be so constituted so nearly alike to the minds of the two as to lead them to the same conclusion that these two arrived at.

I do not intend to express my opinion on the question whether the bare disagreement of a jury on the issue of the guilt or innocence of the wife, she never having denied her guilt under oath, would be sufficient to satisfy the court either that she was not entirely in the wrong, or that she had a reasonable ground of defence.

It is urged that defendant is in contempt of the Supreme Court, and that as the granting of this motion is a matter of favor, it should not be granted while she is in contempt. I do not so understand the doctrine on this subject; I understand it thus: If a party being in contempt of a court asks that same court for a favor, the court will not grant it, and on this ground; a court will not allow a party to say: "I condemn your authority; I will act in open disregard and defiance of it; and while defying you, I will ask you whom I thus condemn and defy to grant me a favor." The reason of the rule does not apply when the favor is asked of one court while the contempt is against another.

The authority of the court in which the favor is asked has not been defied. I think, moreover, that it is very doubtful whether the bare fact that a party is charged in *ex parte* affidavits (although there is no denial of them) with having wilfully disobeyed an order of the court will be sufficient to induce that court to withhold a favor from such party. I am inclined to the opinion that to induce a court to withhold a favor on the ground that the applicant is in contempt, such party must have been adjudged by the court to be in contempt.

It is insisted that if the motion is granted it should be on condition that defendant consents to a reference. I see no reason why a wife should be forced to forego her right of a trial by jury simply because she wishes to be provided with means to conduct her defence, and to be supported pending the litigation.

I have come to the conclusion that counsel fees and alimony should be allowed. As, however, defendant's counsel on the argument expressly waived and abandoned that portion of the motion which called for alimony, and declined to receive it,

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I shall not order it. The court will not thrust on a party a favor which he does not ask but expressly declines.

With respect to the amount to be allowed for counsel fees, I am of opinion that, under all the circumstances, the sum of one thousand dollars should be allowed, with liberty to the defendant to move to increase it on further affidavits, showing more positively and clearly the extent of plaintiff's interest in his father's estate, whether he realizes anything therefrom, and if so, how much.

Let an order be entered directing the plaintiff to pay to defendant or her counsel, Messrs. McKeon & Gerry, one thousand dollars toward the expenses of defending this action, with liberty to defendant to move to increase the amount on further affidavits showing more clearly and positively the extent of plaintiff's interest in his father's estate, whether he realizes anything therefrom, and if so, how much. No costs of this motion to either party. The order to be made without imposing any condition on defendant.

FINNEY *against* VEEDER.

Supreme Court, Third District; General Term, September, 1865.

OFFER OF COMPROMISE.—EVIDENCE

An offer by the respondent, on an appeal from a judgment in a justice's court, to reduce the amount of a recovery, is not admissible in evidence on the trial of the appeal in the county court, for the purpose of influencing the jury to the prejudice of the respondent's case.

Appeal from a judgment of the County Court of Albany county, in favor of the defendant, for costs.

The action was commenced in a justice's court, where a judgment was rendered in favor of the plaintiff for one hundred

dollars damages, besides costs. From that judgment the defendant appealed to the County Court, and recovered judgment for costs. After the notice of appeal was served, the plaintiff served upon the defendant the following offer :

“[*Title of the Cause.*]

“TO WILLET & HAWLEY, *Appellant's Attorneys.*

“Gents: Please to take notice, that the respondent offers to let the judgment herein be corrected, by deducting therefrom the sum of twenty-five dollars.

“July 7th, 1862.

P. D. NIVER,

“*Respondent's Attorney.*”

This offer was not accepted by the appellant.

Ira Shafer, for appellant.

L. Tremain, for respondent.

BY THE COURT.*—INGALLS, J.—The only question involved in this appeal is, whether error was committed in allowing the above offer to be given in evidence under the circumstances, in the manner and for the purpose it was introduced. The only legitimate effect under § 371 of the Code, was upon the question of costs, and I do not think it was necessary even to prove it upon the trial to secure the benefit of that provision, as it might have been used upon the adjustment of costs. But assuming that it could properly be proved upon the trial, it does not follow that it was appropriately received upon the trial in the County Court.

It appears from the case that it was used by the defendant for a purpose wholly unauthorized, and well calculated to prejudice the plaintiff's case. Previous to the introduction of the offer, the counsel for the defendant stated to the jury that *the offer was made because the plaintiff had no confidence in his case.* This statement was objected to by the plaintiff's counsel, on the ground that there had been no proof on the subject, and if an offer had been made, it could not be proved to the jury. The offer was then given in evidence by the defendant, and read to the jury, under the plaintiff's objection.

* Present, HOGEBOM, MILLER and INGALLS, JJ.

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It is insisted by the defendant's counsel that it was properly introduced to apprise the jury of its effect upon the question of costs.

If it be assumed that this position is sound, the difficulty yet remains, as the offer was not used for that purpose; neither the court or counsel informed the jury of the proper effect of the offer. On the other hand, we must assume, from the facts detailed in the case, that an erroneous impression was produced upon the minds of the jury in regard to the object of such offer, which was allowed to remain uncorrected by the court, and probably did influence the jury to the prejudice of the plaintiff. It is said by the defendant's counsel that as the verdict was for the defendant, it is apparent that no injury resulted from the introduction of the offer, as it could only affect the amount of damages in case the plaintiff prevailed in the action.

I do not think we should thus assume, as it is impossible to calculate how far the jury might have been influenced by the improper use of such evidence. An error can only be disregarded where it affirmatively appears that no possible injury could arise to the party complaining (*Worrall v. Parmelee*, 1 *N. Y. [1 Comst]*, 519).

I am, therefore, of opinion that judgment must be reversed, and a new trial had in the County Court, with costs to abide the event.

OAKLEY *against* SEARS.

New York Superior Court; General Term, May, 1863.

NEW TRIAL.—NEWLY DISCOVERED EVIDENCE.—CUMULATIVE
TESTIMONY.

In an action against the drawer of a bank check, the defence being that it was given for the benefit of a third person, on an agreement that it was to be paid only out of funds to be provided by him, the plaintiff testified that before he took the check the defendant told him that he had security, and would pay the check, and that he (plaintiff) took it for value. The

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defendant testified that he never had any conversation with plaintiff before the latter received the check. After verdict for the plaintiff;—*Held*, that newly discovered evidence of declarations of the plaintiff that he knew before he took the check that it was made on the condition alleged by the defendant, was a good ground for granting a new trial. The circumstance that proof of such facts would tend to discredit the plaintiff, does not convert the evidence into mere impeaching evidence. Nor is such evidence to be deemed cumulative, but is direct and independent testimony.

Appeal by the plaintiff from an order made by Mr. Justice BARBOUR, in March, 1863, granting a new trial.

The action was tried February 3d, 1863, before Mr. Justice BARBOUR and a jury, and a verdict rendered for the plaintiff. A case was made by defendant, upon which, as well as upon affidavits, asking for a new trial upon the ground of newly discovered evidence, he moved at special term for a new trial. The motion was granted, and from the order granting the new trial, the defendant appealed.

The action was brought by Thomas B. Oakley against William S. Sears, upon a bank check drawn by the defendant to the order of the plaintiff; and the defence was that a previous check in renewal of which this one was given, was made at the request of one White, and delivered to him, payable to plaintiff's order, with the understanding between the defendant and White that the check was not to be paid until White gave the defendant funds to meet it: that the check was given by the defendant to White for the purpose of enabling White to borrow money of the plaintiff; that the check in suit was given upon the same conditions, and upon the surrender of the original check; and that White never gave any funds to the defendant to meet the check.

The plaintiff, being examined as a witness in his own behalf, testified that he paid twelve thousand dollars in money to White for the original check.

The defendant, being examined as a witness in his own behalf, testified that the original check was given under the circumstances set up in his defence, and that some time after its date the plaintiff called upon him one day at his office, saying, "The check—this first check, had not been paid; said I, You know the arrangement, that you are not to have the money until White puts funds into my hands; whenever he puts it into

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my hands you shall have it. Said he, Do you expect it soon? I said, Mr. White said it was coming soon, and whenever it comes you will get it."

The plaintiff, being recalled and examined on his own behalf, testified that prior to taking the original check from Mr. White, "Mr. Sears held in his possession, I am stating that which Mr. Sears told me, guarantee for the payment of the check. Before I took the check from Mr. Sears I wanted to know whether the check was good, whether Mr. Sears had a valuable consideration for it. He stated that Mr. White was his client with a lawsuit pending in which a large amount of money had to be put up in court. He had collateral security with which he could pay by twenty-four hours' notice, and he would; and I accepted the check upon these remarks from Mr. Sears, knowing he said he had security in his possession, and I held the original check, and notified him by letter and gave him the twenty-four hours' notice that I required it paid. To extend the time to enable Mr. White to consummate his matters, or Mr. Sears, his lawyer, the second check was given. I had no conversation with him about the second check."

The plaintiff had a verdict. The substance of the newly discovered evidence, upon which the defendant moved, is stated in the opinion of the court.

George R. Thompson, for plaintiff, appellant.—I. No error is claimed to have been made upon the trial,*for the purposes of this appeal. It was error for the court at special term, to grant a new trial on the case.

II. The question then is whether the court below was right in granting a new trial on the ground of newly discovered evidence. It is insisted that no newly discovered evidence was revealed upon the motion sufficient to sustain the order. In respect to granting new trials on the ground of newly discovered testimony, the following principles are well settled, viz.:

1. The testimony must have been discovered since the verdict.
2. It must have been such as could not have been attained with reasonable diligence in the former trial.
3. It must be material to the issue.
4. It must go to the merits of the case, and not to impeach the character of a former witness

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5. It must not be cumulative (*People v. Superior Court*, 10 *Wend.*, 285; *Porter v. Talcott*, 1 *Cow.*, 359).

(a.) The order granting the new trial in this case violates several of these rules.

(b.) The evidence could have been attained at the trial by defendant with reasonable diligence. The case ought to be free from laches (*Williams v. Baldwin*, 18 *Johns.*, 489; *Hollingsworth v. Napier*, 3 *Cai.*, 182; *Kendrick v. Delafield*, 2 *Id.*, 67; *People v. Marks*, 10 *How.*, 612; *Leavy v. Roberts*, 8 *Abb.*, 310).

(c) The evidence, if obtained, is not material to the issue, and would not have been admitted on trial. The check is dated October 25th, 1860, and is payable October 20th, 1860. The statement alleged to have been made by plaintiff to Parsons was not made until November, and merely shows that plaintiff knew at that time how Sears came to give the check. There is not a particle of evidence that he knew anything about it when he parted with his money on the strength of the check,—what he discovered afterwards amounts to nothing.

(d) The proposed evidence, if admitted, would tend to impeach the plaintiff. Oakley swears he never knew of any such arrangement as that testified to by Sears. The proposed evidence directly contradicts that statement. When the action is between the original parties a new trial will not be granted to admit proof of admissions of a plaintiff as newly discovered evidence (*Guyot v. Butts*, 4 *Wend.*, 579). As to what is impeaching evidence, see *Brown v. Hoyt*, 3 *Johns.*, 255; *Shumway v. Fowler*, 4 *Id.*, 425; *Harrington v. Bigelow*, 2 *Den.*, 109; *Meakim v. Anderson*, 11 *Barb.*, 215; *Beach v. Tooker*, 10 *How. Pr.*, 297. The proposed evidence establishes no new fact. It merely goes to disprove, if evidence at all, what has already been sworn to by Oakley. A new trial will not be granted by means of the discovery of such evidence (*Halsey v. Watson*, 1 *Cai.*, 24; *S. C., Col. & Cai. Cas.*, 160). The evidence discovered is cumulative. If newly discovered evidence relates to any fact proved or controverted, whether bearing upon the issue directly or collaterally, it is cumulative (*Leavy v. Roberts*, 8 *Abb. Pr.*, 310; *Brisbane v. Adams*, 1 *Sand.*, 195.) The evidence is to a point testified to by Sears, and denied by Oakley. It is strictly cumulative, because it goes to show the same fact exactly (See *Adams v. Bush*, 23 *How. Pr.*, 262.)

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L. S. Chatfield, for the defendant, respondent.—I. What is cumulative evidence is not very well settled, but the leading distinction is that it must not be of the same *kind*, to establish the same fact, as in 4 *Wend.*, 579, where the new evidence is *direct*, and the former was circumstantial, to prove the same fact (*Graham's Pr.*, 630.)

Such evidence is not of the same kind or character. One is direct, the other is circumstantial (*Seeley v. Chittenden*, 4 *How. Pr.*, 265 ; 10 *Wend.*, 285 ; *Porter v. Talcott*, 1 *Cow.*, 381. *Simmons v. Fay*, 1 *E. D. Smith*, 107 ; *Sargent v. ———*, 5 *Cow.*, 106 ; 10 *Barb.*, 307 ; *Guyot v. Butts*, 4 *Wend.*, 579 ; *Platt v. Munroe*, 34 *Barb.*, 279.)

II. When parties are the only witnesses, if evidence other than that of the parties can be obtained, it is certainly desirable that it should be obtained, and this remedy should be most liberally applied.

III. The gravamen of these motions is the furtherance of justice, and to ascertain the real truth. It is purely a discretionary motion, governed so far as it may be, by precedents (*Platt v. Munroe*, 34 *Barb.*, 279), and it is submitted that when a new trial is granted, the order granting is not an appealable order. (10 *Barb.*, 303.)

BY THE COURT.*—BOSWORTH, CH. J.—The plaintiff and defendant were the only witnesses, as to the interview between themselves, and what was then said between them ; or as the interviews between them and Mr. White, when the three were together. Their testimony is in direct conflict throughout. The suit is upon a check made by the defendant. The judge charged that, “if Mr. Sears is to be believed, it (the check) was delivered to White to be used in a certain manner, and for a certain purpose. It was delivered with the understanding that it was not to be paid by Mr. Sears, the maker of it, except out of the funds which should come into his hands, belonging to White. If you believe that statement of Mr. Sears, the defendant is entitled to your verdict.”

Assuming that instruction to be correct, as perhaps we must for the purposes of this appeal (*Tappan v. Butler*, 7 *Bosw.*, 487 ; *Bunten v. The Orient Mut. Ins. Co.*, 4 *Bosw.*, 255), but without expressing any opinion as to its accuracy, it is quite clear on

* Present, BOSWORTH, CH. J., and MONCRIEF, and WHITE, JJ.

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this assumption that the newly-discovered evidence is material. Evidence of the plaintiff's declarations that he knew when he received the check, that it "was a loaned check, without any consideration being paid to the said Sears for it," would naturally lead the jury to believe Mr. Sears' statement as to the origin of the check, and the use it was to serve; as his testimony was in no way impaired, except by the contradiction by the plaintiff, in testifying what took place between him and Mr. Sears before the original check was accepted by the plaintiff. The defendant explicitly denied that he knew or conversed with the plaintiff before he received the original check. But for the testimony given by the plaintiff, as to an interview between himself and the defendant before the plaintiff received the original check,—to the effect that Sears told him "he had collateral security with which he could pay by twenty-four hours' notice, and he would,"—the defendant, under the charge made, for aught we can perceive, should have had a verdict in his favor.

Proof, by the testimony of these persons, that the plaintiff knew, or had notice when he took the original check, that it was made on that consideration, and as a memorandum check and not to be paid or demanded until White put Sears in funds to pay with, would be proof of facts, which with Sears' testimony as to the origin of the check, if unimpeached, would entitle him to a verdict. The circumstance that proof of such facts would tend to discredit the plaintiff, does not convert the evidence into mere impeaching evidence. It is nevertheless, as truly, direct and pertinent evidence to the merits, as if the plaintiff had not testified to any conversation between himself and Sears before taking the original check.

Declarations of the plaintiff that he knew the check was so made and was to be so used, is competent evidence to establish the same facts, and is none the less evidence in chief, because it may also tend to impeach.

It is not cumulative merely. The defendant did not offer any evidence, nor testify himself, either as to any declarations of the plaintiff to Parsons on the subject, nor as to any notice to or knowledge of the plaintiff, at the time he took the original check, as to its origin and the use to be made of it, except in so far as the alleged conversation, prior to giving the secured check, would tend to show he had such knowledge. The plaintiff denies that any such conversation took place.

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The newly discovered evidence is direct and independent testimony tending to show notice to the plaintiff of facts, which if communicated and existing, might prevent his recovering; it is not to a point, upon which any testimony was directly given or offered by the defendant at the trial. If his testimony has any claims to fairness, it is to a matter which he had no right to expect would be material. Now if the check was made as he swears it was, and was transferred as collateral to a precedent debt, there could be no recovery.

And if it be true, as the plaintiff swears, that he paid twelve thousand dollars cash for the check, he will of course recover if he took it in good faith, and without notice that it was fraudulently diverted from the purpose for which it was made. But if he had the notice which Parsons' affidavit tends to show he had, he may not be able to recover.

What Mr. Parsons' testimony may be we can only infer from his affidavit: we understand it to import the making of a declaration to him, by the plaintiff, that he knew, when he took the original check, what he represents the plaintiff to have stated that he knew.

Simons v. Hay (1 *E. D. Smith*, 107), and the cases there cited, show that the newly discovered evidence, cannot be regarded as merely cumulative, or impeaching testimony.

The order should be affirmed.

SMITH *against* MULOCK.

New York Superior Court; General Term, July, 1863.

PARTNERSHIP.—PLEADING.—CONTRACTS.—BILLS, NOTES AND CHECKS.

A provision in articles of co-partnership, prescribing a definite period for its continuance, is sufficient, without any prohibition of an earlier dissolution, to prevent either party from dissolving it at will.

Where the articles of co-partnership do not give either partner a right to dissolve at will, an allegation by one partner, contained in a pleading,

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and not responsive to any proposal of his adversary, of his desire to dissolve, is not equivalent to an acceptance of an offer to dissolve, which was made by the other party a month previous.

Where a creditor made a loan to his debtors, upon an agreement that they would repay it out of the proceeds of a note for a much larger amount which they had procured to be indorsed by a third person for their accommodation, or would deliver the note to him; and, the note not being discounted, they subsequently delivered it to him, in satisfaction of the loan, and of their prior indebtedness;—*Held*, that the contract was to be regarded as entire, and that he had parted with a new consideration, sufficient to make the indorsement binding.

It seems, that the indorser in such case would not be exonerated by mere proof of notice to the purchaser of the note, that the partnership between the makers had been dissolved, subsequent to the date of the note.

Appeal from a judgment entered on a verdict in favor of the plaintiff.

The complaint in this action, which was by Willard H. Smith against Maria Mulock, alleged, in the usual form, as the cause of action, a promissory note made by George W. Wood and William G. Mulock, by their firm name of Geo. W. Wood & Co., for the sum of two thousand five hundred dollars,—payable to the order of the defendant, and indorsed by her, and subsequently transferred to the plaintiff before maturity, and for value.

The answer of the defendant stated that the note was not made or signed by the co-partners of the firm, or for the business of the firm, but that the firm name was signed to it by Wood, for his individual benefit and gain, and in fraud of the defendant and of his partner. It further denied that the note was made or signed on or about its date, or came into the possession of the plaintiff before maturity, or for value; and denied that either after the same was so signed, or on the day of its date, or at any time since the date thereof, she endorsed it in writing, or ever delivered, or authorized it to be delivered, to the plaintiff; and denied that the plaintiff was the lawful holder or that the defendant was justly indebted.

It further alleged that this action was prosecuted in the name of the plaintiff, for the benefit and at the request of Wood, and in fraud of the defendant. Also, that the indorsement was made before the note had any date, time of payment, or signature of maker, and was without consideration and for accommodation of the firm named; and that it was obtained from de-

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fendant by false representations alleged to have been made by Wood, and another person, a dormant partner. Other facts appear in the opinions.

The cause was tried before Mr. Justice BARBOUR, and a jury, on the 5th day of February, 1863. The jury, under the direction of the court, found a verdict for the plaintiff for the amount of the note, and interest; and judgment thereon having been entered, the defendant now appealed.

James T. Brady & Francis Byrne, for defendant, appellant.—I: The notes were endorsed by the appellant, without consideration, and solely for the accommodation of said firm, and to be used during its existence, and for its business.

II. The agreement of partnership did not contain a stipulation (of a negative character) "that the co-partnership should not be dissolved: therefore "either party" might, "by his own act," dissolve the partnership, "unless restrained by the compact between them to continue it for a definite period" (*Griswold v. Waddington*, 15 *Johns.*, 57; affirmed, 16 *Johns.*, 438; 19 *Johns.*, 538).

And Mulock effectually dissolved said firm by the service of his notice and publication of the same, and Wood assented thereto, by his statement in his answer on oath in the action brought to dissolve the co-partnership "that the defendant is desirous of having the partnership aforesaid terminated and dissolved." The firm was, therefore, on February 1st, 1862, "dissolved by mutual consent."

III. The right of one to bind another by the signature of the firm name is not derived from the relation of partners, but on a presumed agency for each other for that purpose, and is limited to the duration of such partnership, and ceases on the dissolution; and then neither can "bind the other by issuing notes, signed with the name of the partnership" (*Lansing v. Gaines*, 2 *Johns.*, 300); nor endorse note or bills given to the firm before the dissolution, even though authorized to settle partnership debts (*Sandford v. Mickles*, 4 *Johns.*, 224); nor even renew a partnership note, &c. (*National Bank v. Norton*, 1 *Hill*, 572; *S. P.*, *Mitchell v. Osborn*, 2 *Hill*, 520; *S. P.*, *Lusk v. Smith*, 8 *Barb.*, 570; *Kirby v. Hewitt*, 25 *Barb.*, 607; *James v. Pope*, 5 *Smith*, 324; *City Bank of Brooklyn v. McChesney*, 20 *N. Y.*,

241; City Bank of Brooklyn v. Dearborn, *Id.*, 244; Robinson v. Fuller, 24 *N. Y.*, 572).

IV. This is not an action against one who was a partner in the firm, but against an innocent person whose authority to the firm to bind her was limited to the time when the firm was in existence; the partnership having been dissolved, the authority was immediately extinguished (*Michigan Ins. Co. v. Leavenworth*, 30 *Ver.*, 11).

V. The plaintiff acted in collusion with Wood, and took the note sued upon in payment of the two thousand and seventy dollar note that was protested, and as payment of five hundred dollars he had previously loaned to said Wood; the circumstances that the firm was insolvent and closing up its business; that the property was being removed from the store; that the safe was being disposed of, and that a lady was the endorser, were sufficient to put him on inquiry.

VI. The statement in the answer of the defendant George W. Wood produced, was proper evidence of a consent to dissolve the partnership, and ought to have been submitted to the jury, and the exception is tenable.

VII. The several requests of the counsel of the defendant to charge should have been acceded to, and the facts should have been submitted to the jury for their determination, and the exceptions to the rulings and directions are valid (*Bidwell v. Laurent*, 17 *How. Pr.*, 357).

Henry W. Johnson, for plaintiff, respondent;—cited, as to the sufficiency of the proof of the note, and the authority to make it *Story on Prom. Notes*, §§ 135, 380 & 387; *Erwin v. Downs*, 5 *N. Y.* [1 *Seld.*], 575; *Ogden v. Blydenburgh*, 1 *Hilt.*, 183. And as to the presumption that plaintiff was a *bona fide* holder, *Vallett v. Parker*, 6 *Wend.*, 615; *Ross v. Bedell*, 5 *Duer*, 462; *Case v. Mechanics' Bk'g Ass'n*, 4 *N. Y.* [4 *Comst.*], 166.

BY THE COURT.*—ROBERTSON, J.—The defendant became endorser of the promissory note, in suit in this action, by writing her name on the back of a piece of blank paper, and delivering the same to her two sons, with intent that they should write a promissory note on the face thereof, to be used by them

* Present, ROBERTSON, WHITE and BARBOUR, JJ.

for the benefit of the firm of which they were members. She now claims that the firm in which they were partners was dissolved before such note was passed away; that one of her sons subscribed the name of the firm to such promissory note after the dissolution, and passed the note to the plaintiff in satisfaction of a precedent indebtedness; or with knowledge of such dissolution.

The partnership of the defendant's sons began in January, 1860, to continue three years, under an agreement in writing. The note in suit came into the plaintiff's possession in February, 1862. In January previous one of such sons (Mulock), served upon the other (his partner, Wood), and another person (Ackerman), whom he claimed to be a partner, a written notice that he had dissolved such partnership. A like notice was published by the same partner in two papers, in the city of New York, of large circulation. Five days previous to serving such notice the partner giving it (Mulock), commenced an action against his co-partner (Wood), and Ackerman, to dissolve such partnership, in which he obtained an injunction. Subsequently, after discontinuing that action, he began a new one for the same purpose. As the complaint in that last action was not in evidence, it does not appear what allegations were made in it, in regard to a dissolution. The answer in it, however, put in on the 1st of February 1862, contained this phrase: "This defendant is desirous of having the partnership aforesaid terminated and dissolved." This is claimed to have produced an actual dissolution, by construing the notice of the 12th of January to have been an offer, and such allegation an acceptance of it. The original agreement made no provision for a dissolution; and I apprehend where such an agreement prescribes a definite period for the continuance of a partnership, it is sufficient, without prohibiting an earlier dissolution, in order to deprive the parties to it of the right of dissolving at will (*Griswold v. Waddington*, 16 *Johns.*, 438; S. C., 15 *Johns.*, 57). The announcement to the court by a party to an action, in a pleading, when not responsive to any proposal of his adversary, of a readiness, or even of the most earnest desire to dissolve a partnership, cannot be converted into a contract *in pais*, or stipulation of record; in the former case to be enforced by a specific performance, or in the latter by a decree without further litigation. Still less could it be construed into the

acceptance of an offer to dissolve, made a month before ; if the notice in January was such, and not a mere notification of the determination of the party notifying, whatever his partner might say. This, therefore, not creating a dissolution, and there being no other evidence of one, there was no question upon it for the jury ; a mere willingness to dissolve being no evidence of a previous dissolution.

The consideration given for the note in question, according to the plaintiff's testimony, was a loan of five hundred dollars, a few days before the 14th of February. This loan was made upon a promise either to repay the same out of the proceeds of the note in suit, if it could be discounted, or to deliver that note. It was not discounted, but was delivered to the plaintiff in satisfaction of such loan, and a prior note of the same firm, held by him. This testimony is not contradicted even by the partner who delivered it (Wood). The promise to deliver the note or its proceeds in consideration of the loan, entitled the plaintiff, in equity, to one or the other ; and the time of the application of the residue of the plaintiff's advance, consisting of the prior note, to such new note, whether at the time of the agreement or when the latter was delivered, was immaterial. The contract was entire, and a new consideration parted with, sufficient to make the indorsement binding on the defendant.

Even if the plaintiff had or was bound to take notice of the dissolution of the firm, that knowledge would have an entirely different effect upon the liability of the member of the firm who did not sign the note, and that of the defendant. Without some authority remaining in the partner signing, the other partner would not be liable. But the defendant would be liable as endorser, whosoever's name was subscribed to the note, unless the purchaser had notice of the limitation of the authority to make a note, to drawing one for the benefit of the firm, and signed by it. The note in this case was delivered by one of that very firm, to a purchaser, to discharge a liability incurred by that firm. The partner delivering it was responsible at all events, and it was not incumbent on the plaintiff to inquire who else was, provided the defendant was.

But in fact the case does not disclose any very clear request to submit any controverted question of fact to the jury, or to give them any instruction as to any point of law. The request to submit the question "Whether the plaintiff parted

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"with value, *without notice sufficient to put him upon inquiry as to the liability of the endorser, or the validity of the paper,*" was not sufficiently definite or pointed. *The liability of the endorser, or the validity of the paper,* was a question of law, and not of fact alone. The facts which were to absolve the defendant from liability were either the dissolution of the firm, and knowledge of it by the plaintiff, or some limitation of the use to which the note was to be applied, transgressed in passing it to him.. The notice, necessary thus to absolve the defendant, was of course of evidentiary facts, leading to the discovery of such ulterior facts. A mere notice to the plaintiff, that the endorser would not be liable, without knowledge of the facts by which she was to escape liability, would not acquit her; and an inquiry which would end in that information alone would be of no avail. Of course, if that information, when obtained, would not render the note void in the hands of the plaintiff, notice of facts leading to an inquiry for it would be immaterial. But there was no evidence of any facts constituting notice of anything to put the plaintiff on his guard. Notice that the makers of a note signed with their firm name, had dissolved partnership, formed no ground for suspecting that such note, dated six months previously, was about to be diverted from the use for which it was intended, when employed by a partner in paying that firm's debts. The defendant's counsel did not disclose in his request, what *that was*, of which he considered there was evidence, and which was equivalent to a notice of *something* which relieved the defendant from liability, because it was sufficient to put the plaintiff on inquiry after that which constituted such relief as matter of law. Such request was therefore properly refused, not only as being too indefinite, or irrelevant, but also as not having any basis in the evidence. There was indeed no evidence of any knowledge by the plaintiff of a misapplication of the note, or of want of new consideration for it, and the plaintiff was entitled to judgment.

The judgment must be affirmed, with costs.

affirmed
47 May. 570.

AYRAULT *against* THE PACIFIC BANK.

New York Superior Court ; General Term, November, 1863.

COLLECTING AGENT.—COSTS.—FORMER ADJUDICATION.—EVIDENCE.

An agent for the collection of negotiable paper who fails to take the necessary steps to charge the indorsers thereof, is not liable to the owner for the costs of an unsuccessful suit by the latter against the indorsers, unless, by some misrepresentation or other act, he induced the bringing of such suit.

On appeal from a judgment, entered on a verdict which includes a recovery on separate causes of action, one of which is not sustained by the evidence, if the evidence relied on in its support was not admissible in support of the other cause of action, and yet was such as may have prejudiced the jury in reference thereto, the court will not allow, absolutely, the respondent to retain his judgment on deducting the erroneous part, but will allow the appellant a new trial on terms.

This was an appeal from a judgment entered on a verdict against the defendants, recovered by Warren Ayrault, the plaintiff, on a trial before Mr. Justice MONELL and a jury, on the 10th of December, 1862.

The contents of the pleadings, and the material facts, are stated in the opinion of the court.

R. O'Gorman, for defendants, appellants ;—Insisted that there was no evidence of negligence on their part ; that the plaintiff himself was negligent ; and the indorsers had other defences on the merits which would have exonerated them, even had they been charged as such, by due demand, and notice, &c. ; and hence that the plaintiff had not been damaged.

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Enos N. Taft, for plaintiff, respondent.—I. The general liability of a bank, receiving paper for collection, for failure to demand payment, and give notice to the indorsers, is well established by numerous decisions (*Smedes v. Bank of Utica*, 20 *Johns.*, and *S. C.*, in this court, 3 *Cow.*, 663; *McKinster v. Bank of Utica*, 9 *Wend.*, 46; 11 *Wend.*, 473; *Allen v. Merchants' Bank*, 22 *Wend.*, 228; opinion by Senator Verplanck. See also *Walker v. The Bank of the State of New York*, 9 *N. Y.*, [5 *Seld.*], 584; *Montgomery County Bank v. Albany City Bank*, 7 *N. Y.* [3 *Seld.*], 460; *Brown v. Richardson*, 1 *Bosw.*, 402; *Bedell v. Commercial Mutual Ins. Co.*, 3 *Bosw.*, 147; *Rider v. Union India Rubber Co.*, 4 *Bosw.*, 169; *Anthony v. Smith*, 4 *Bosw.*, 503.)

II. The testimony on the question of negligence on the part of the bank was conflicting, and the question was very properly submitted to the jury, and their decision must control (*Foot v. Wiswall*, 14 *Johns.*, 304; *Purvis v. Coleman*, 1 *Bosw.*, 326).

III. So of the question of negligence on the plaintiff's part.

IV. The objection that plaintiff suffered no damage is not sustained.

V. The jury, under the circumstances, had a right to consider the question as to whether the costs of the former action should be included in the plaintiff's damages, and the defendant had no right to have it wholly withdrawn from them. If the defendants desired any more specific instructions, in submitting the question to the jury, they should have asked for them; and, failing to do so, they cannot now object to the submission as it was made.

If, however, the court should be of opinion, that this exception was well taken, that will not necessitate the sending of the case back to the court below; but the court here can require the judgment to be reduced by the amount so allowed for costs and the interest thereon, or by such part thereof as they may determine.

VI. The court submitted all the questions of fact to the jury in a manner quite as favorable to the defendant as the case will warrant; and no ruling excepted to is unjust to the defendant.

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By THE COURT.—ROBERTSON, J.—Two causes of action are set out in the complaint in this case.

First. A failure by the defendants to make demand on the maker, and give notice of non-payment to the endorsers of two promissory notes for four hundred dollars each, payable to the order of G. Ayrault, and deposited with them for collection. This was alleged as a breach of contract, or non-performance of a duty to do so.

Second. An untrue representation by the defendants after the maturity of such notes, to the plaintiffs' firm, the owners of them, that the former had properly caused demand of payment to be made of the owners, and notice of non-payment to be given to the endorsers thereof, relying on which, the plaintiff brought suit against the latter, and were defeated, and compelled to pay costs.

The complaint claims as damages the amount due on such notes, with interest, and the costs incurred in such action against the endorsers. The plaintiff's partner (G. Ayrault), released his interest in such claims to the plaintiff.

The complaint in this case alleges that the plaintiff and his partner recovered judgment against the maker of such notes, on which execution was issued and returned unsatisfied, and that he was, at the time they became due, has ever since been, and now is insolvent. That the endorsers were perfectly responsible, and still are, and by the failure of the defendants properly to charge them, the holders lost two certain sums of money, equal to the whole amount due on such notes; and that the makers had paid on them after they became due, about one hundred and fifty-six dollars. The answer controverted all the facts stated in the complaint, except a deposit of the notes.

No evidence was offered to sustain the second cause of action, to wit, that the plaintiff and his partners were induced to commence an action against the endorsers by any representations of the defendants. The defendants' counsel requested the court to instruct the jury that they could only find for the plaintiff for the amount of the notes and interest. The court, however, refused so to instruct them, and directed the jury to add the costs of the former action to such amount; to which the defendants excepted.

The costs of such former action are not a necessary consequence of the defendant's neglect, if any existed. On the con-

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trary, if the endorsers were liable, the defendants were not and *vice versa*. If the defendants had guarantied the notes to be collectible, or in any other way actively induced the plaintiffs to bring the action, they would have been liable for the costs; as it is, the charge was erroneous, and the judgment must therefore be reversed.

In ordinary cases the court may permit a party to stipulate to reduce his damages in order to save his judgment. In this case the error was committed in regard to a separate cause of action, and the introduction of the record of failure in such former action against the makers, which was only admissible to sustain the claim for costs, and was not evidence against the defendants for any other purpose, may have seriously prejudiced the jury in rendering their verdict. For these reasons we think a new trial should be had absolutely, if the defendants pay the expense of the former trial; the possibility, or probability of a mistake by the jury, being the strong reason for not permitting the plaintiff to stipulate.

Upon such new trial, any too great positiveness in directing the jury to find a verdict, for the amount of the notes in case they find against the defendants on the question of negligence may be avoided, as the question of the plaintiff's loss seems to involve the question of the responsibility of the maker, as well as that of the endorsers (*Allen v. Suydam*, 20 *Wend.*, 321; *Hoard v. Garner*, 10 *N. Y.* [6 *Seld.*], 261; *S. C.*, 3 *Sandf.*, 179).

The judgment, therefore, must be that if the defendants stipulate in five days to pay the costs of the former trial, and in five days thereafter pay them, the judgment be reversed, and a new trial had, with costs to abide the event. But if they do not stipulate, then that said judgment be affirmed, in case the plaintiff stipulates within ten days to deduct the costs of the former action from the verdict, or credit them on the judgment. But if neither the defendants nor plaintiff so stipulate, that the judgment be reversed, and a new trial had, with costs to abide the event. The judgment to be settled on two days' notice.

HUNTINGTON *against* DOUGLASS.

New York Superior Court ; General Term, November, 1863.

EVIDENCE.—MEASURE OF DAMAGES.—ATTACHMENT.—SALES.

In an action for damages for the conversion of goods, which the plaintiff had bought of the defendant and left in his possession under a special agreement, where the only proof of a conversion is a demand and refusal, evidence is admissible that, at the time of the sale, the goods belonged, as the plaintiff knew, not to the defendant, but to a third person, who, before the demand had taken the goods away from the defendant against his will.

So is evidence that before the demand they had been seized by the sheriff on an attachment against such true owner.

The warranty of title, implied in a sale of chattels, does not estop the seller from setting up that he was deprived of possession by paramount title (*Per* ROBERTSON, J.)

Appeal from a judgment entered on a verdict for the plaintiff.

The action was brought by Calvin Huntington against Charles Douglass and Thomas Douglass to recover damages for the conversion of certain goods, alleged in the complaint to have been "*converted*" by the defendants to their own use. The defendants, by their answer, denied the plaintiff's ownership of the property : they also denied any conversion thereof by them.

The cause was tried on the 25th of March, 1863, before Mr. Justice WHITE, and a jury.

The plaintiff read in evidence an agreement as follows :

"Insured in Market Ins. Co.,

"N. Y., June 21st, 1861.

"We, the undersigned, have sold to Calvin Huntington, and
"delivered, as per invoice rendered this date, four thousand
"five hundred and forty-nine $\frac{33}{100}$ dollars, tools and mdse., for
"the sum of two thousand two hundred and fifty dollars, cash
"paid to Harlow Huntington, on debts due him from the
"Douglass Manfg Co.

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"The aforesaid goods are all stored in the north-east side of the upper basement of the store now occupied by us, No. 68 Beekman street, N. Y., insured in the name of Calvin Huntington, and held subject to his order, any portion of which he may order sold, on consignment, by us, for which sales we agree to pay monthly, in cash, the amount the goods cost him. The proceeds of the goods, over and above the costs and charges to Calvin Huntington, to go to the payment of other liabilities of Harlow Huntington, for N. R. Douglass.

"June 21st, 1861.

"CHARLES DOUGLASS,

"THOMAS DOUGLASS."

The plaintiff also proved an invoice, or bill of parcels of the goods, mentioned in the foregoing agreement, the heading to which was

"Mr. Calvin Huntington

Bought of Thomas Douglass."

Then followed the items of goods sold, amounting in the aggregate to four thousand five hundred and forty-nine dollars and fifty-three cents.

The invoice bore date on the same day as the agreement, and was receipted as follows:

"Received payment, on the conditions specified in the agreement,

THOMAS DOUGLASS."

There was no other delivery of the goods than such as is evidenced by the written instruments above referred to, and their being separate and placed by themselves in a part of the defendants' store. The papers were signed at the defendants' store, in the basement of which the goods had been placed.

Subsequently, the goods were demanded by the plaintiff, of the defendant Charles Douglass, who refused to deliver them.

The defendants offered to prove that the goods in question belonged to one Ames, and that the plaintiff knew this at the time of the sale to him, and that, before any demand was made of the defendants by the plaintiff, Ames, against the directions of the defendants, took possession of the property, and removed it from the defendants' premises. This evidence was excluded by the judge, and the defendants excepted.

There was conflicting evidence as to the delivery of the

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bill of sale to the plaintiff; the defendants testifying, substantially, that Bottom, to whom the paper was delivered as the agent of the plaintiff, was not to deliver it until the money was paid, and that the money had not been paid. This was contradicted by both Bottom and the plaintiff.

The defendants also offered to prove that before the plaintiff demanded the goods, a portion of them had been taken and removed by the sheriff, under an attachment against Ames. This evidence was also excluded by the judge, and the defendants excepted.

At the close of the evidence, the judge directed a verdict for the plaintiff, leaving the jury to assess the damages from the evidence before them. To this the defendants excepted.

From the judgment entered upon the verdict, the defendants appealed to the General Term.

Thomas Nelson, for defendants, appellants.—To sustain this action, which, in its nature, is the action of trover at common law, the plaintiff must prove a title to the property either *general or special*, with the right of its *immediate possession*, and a *conversion by the defendants*.

I. The plaintiff has no *general property* in the goods. The answer contains a special denial of his title, as well as of a conversion.

At most he had but a *special property, as security for such money as he had advanced*. The goods were not to be taken by the plaintiff from the store, nor to be consigned to or sold by any other party than the defendants. Aside, therefore, from the relation of vendor and vendee, the relation of *bailor and bailee* is created by the express terms of this contract. The surplus on such sale was to be applied for the benefit of Harlow Huntington, upon his liabilities for N. R. Douglass. The plaintiff had no interest in this surplus. The contract expressly provides for the amount to be paid to the plaintiff, and what shall be paid to N. R. Douglass on debts for which Harlow Huntington was liable; thus by express provision, cutting off all personal claim of the plaintiff on that surplus, or upon the goods, after repayment to him of the sum he had advanced.

II. The plaintiff has no special property in the goods which will enable him to sustain this action.

(a.) The contract or bill of sale was never delivered; the

conditions upon which its delivery to the plaintiff was to be made were never performed by him.

The defendants are not estopped from proving those facts by the execution of that bill of sale, for the object of it is to show that the bill of sale was never perfected, and never had a legal existence (1 *Greenl. Evid.*, § 284; *Clark v. Gifford*, 10 *Wend.*, 310). The testimony is also admissible on general principles, as it contradicts no provision of the writing. Its effect is to show how the money was to be applied, which in the writing the plaintiff agreed to advance. It is the proof of a *collateral* fact, unprovided for in the agreement, and which is admissible, even in the case where the existence of the contract is not denied (1 *Greenl. Evid.*, § 89).

III. The fact that the goods were taken from the possession of the defendants by Oakes Ames, under a previous and paramount title, before the commencement of this suit, and before a demand was made, is a bar to this action (*Edson v. Weston*, 7 *Cow.*, 278; 1 *Smith's Lead. Cas.*, 480; *Shelburg v. Scottsfield, Yelv.*, 23; *Bates v. Stanton*, 1 *Duer*, 79; *Wilson v. Anderton*, 1 *B. & Ad.*, 450).

As a general rule, if property is sold by one having it in his possession at the time, but to which he has no title, the remedy of the purchaser is upon the implied warranty of title. The action of trover is not the appropriate remedy when the vendor has no title to the property sold, and of which defect the purchaser was informed at the time of his purchase. In such case, no fraud has been committed upon him, and he has sustained no injury for which an action in form *ex delicto* can be sustained (*Hawkins v. Hoffman*, 6 *Hill*, 588; *Whitney v. Slauson*, 30 *Barb.*, 276).

IV. There has been no conversion of this property by the defendants, and for that reason, there was error in directing a verdict for the plaintiff. (a.) The demand was made after the goods had been taken from the possession of the defendants. (b.) It is not pretended that the defendants have used the goods, or in any way appropriated any part of them to their use and benefit. A conversion is a positive tortious act, and it is not sufficient for plaintiff to prove mere negligence (3 *Phil. Ev.*; *Cow.*, *Hill & Edws. Notes*, 539; *Andrews v. Shattuck*, 32 *Barb.*, 396; *Whitney v. Slauson*, 30 *Barb.*, 278; *Polley v. Lenox Iron Co.*, 2 *Allen*, 184). Nor can plaintiff

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sustain his judgment by saying that his proofs show a cause of action, if it is other than, and different from, that set out in the complaint (*Moore v. McKibbon*, 33 *Barb.*, 246; and see *Hawkins v. Hoffman*, 6 *Hill*, 588).

V. There is error in the direction of the court, that a verdict be rendered for the plaintiff for the whole amount and interest, instead of merely for the extent of the plaintiff's lien or claim upon the property. The value of the goods taken in the attachment should have been deducted (*Story on Cont.*, § 742, *a*. See also *Ogle v. Atkinson*, 5 *Taunt.*, 759; *Larschman v. Machin*, 2 *Stark.*, 311).

VI. The verdict is excessive.

C. A. Nichols, for plaintiff, respondent.—I. The testimony offered, to prove a title in Oakes Ames prior to the conveyance to the plaintiff is wholly inadmissible, as it would at once allow a bailee to dispute the title of his bailor, and a vendor to set up his own fraud against the title of his vendee (*Marvin v. Elwood*, 11 *Paige*, 365; *Bates v. Stanton*, 1 *Duer*, 79).

II. The inquiry as to what conversation occurred prior to the execution of the papers was plainly irrelevant: the writing was the best and only admissible evidence of the intention.

III. The offer to prove that the consideration was to be paid to the defendants could not be entertained, for by the agreement the plaintiff was to pay it to the creditors of the defendants. The court offered the defendants an opportunity to prove that there was never an absolute delivery, to the plaintiff, of the bills of sale.

IV. The court was correct in charging that the recovery of the plaintiff must be for the actual value of the goods, and was not limited to the amount of consideration paid.

BY THE COURT.—MONELL, J.—It was error to exclude the evidence offered by the defendants, that at the time of the sale, Ames was the owner of the property in question; and that subsequently, and before the demand, he took possession and removed it from the defendants' premises and control.

The demand and refusal, upon which alone the plaintiff rested as proof of conversion, was *prima facie* evidence merely, and could be repelled by proof that a compliance with the demand was impossible (*Kelsey v. Griswold*, 6 *Barb. S. Ct.*,

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436 ; Hill v. Covell, 1 N. Y. [1 Comst.], 522 ; Whitney v. Slau-son, 30 Id., 278 ; Andrews v. Shattuck, 32 Id., 396).

The offer was to show that, at the date of the bill of sale, Ames was the owner of the property ; that the plaintiff knew it, and that subsequently, and before the plaintiff's demand, Ames took possession, and removed the property "against the wishes and in spite of the remonstrances of the defendants." If this evidence had been admitted, it would have repelled the proof of conversion resting in the refusal of the defendants to deliver the property to the plaintiff, they not then having the possession or any control over it.

Of the same character was the evidence subsequently offered by the defendants,—that before the demand, a portion of it had been seized and removed by the sheriff under an attachment against Ames. As is well settled by the cases above cited, such proof would have shown that the defendants could not deliver the property, and hence there was no conversion.

There must be a new trial, with costs to abide the event.

ROBERTSON, J.—There was conflicting evidence as to the absolute delivery of the instrument of the 21st of June, 1861 ; also as to the waiver of any condition upon which it was placed in the hands of Bottom. The direction of the learned judge to the jury to find a verdict for the plaintiff was peremptory. Unless the condition upon which the evidence tends to show a conditional delivery, was one which could not have been imposed, because contrary to the face of the agreement, the charge was erroneous.

The instrument on its face purports to be executed for a certain sum "*cash paid* to Harlow Huntington on debts due him from the Douglass Manfg. Co." The defendants testified that the depositary (Bottom) was not to deliver it, until that money was paid, and efforts were made to procure it. There is nothing in the condition contrary to any stipulation in the agreement. If it had been absolutely delivered, it would have been evidence of the payment, and the defendants would have been obliged to disprove it.

If the instrument had been absolutely delivered, it was clearly not an absolute sale of the goods. The defendants by it were only to repay to the plaintiff what is called the *cost* of the goods, which was money paid to Harlow Huntington

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for debts of the Douglass Manfg. Co.; all the residue was to go to the payment of other liabilities of Harlow Huntington for N. R. Douglass. It probably was an assignment *in trust*; to secure, first, the debt due to the plaintiff, and secondly, other liabilities of Harlow Huntington for a third person, and possibly may have vested the whole title in the plaintiff.

I do not understand that a warranty of title on a sale of chattels can be so far implied as to estop the vendor from setting up the deprivation of possession by paramount title. Such a warranty is a mere executory covenant, the breach of which entitles the injured party to damages. The law will not tolerate the absurdity of both implying a warranty to enable the party to recover damages, and an estoppel, which presupposes that the warranty has been complied with. If sued for not delivering the property as mere bailees, the defendants of course can set up paramount title in another, who had a right to take possession. The cases cited by my brother MONELL, fully establish this. There was evidence offered to show such taking possession, and it was excluded.

The delivery of the goods to the plaintiff was entirely constructive, and depends upon the delivery of the instrument of June, 1861.

I concur in thinking the judgment should be reversed, and a new trial granted, with costs to abide the event.

Judgment reversed.

STEVENS *against* HAUSER.

New York Superior Court; General Term, May, 1863.

LIMITATION OF ACTIONS.—BANKRUPTCY.

An action by an assignee, in bankruptcy, under the act of Congress of 1841, or by his grantee, to recover the possession of real property held adversely to the bankrupt, must, by the limitation prescribed by that act, be brought within two years after the date of the decree of bankruptcy; or if the cause of action had not then accrued, within two years after it did accrue.

*Reversed
39 ny 302*

Stevens v. Hauser.

Motion for judgment upon a verdict for the defendant, taken subject to the opinion of the court at general term.

The action was brought by Bushnell Stevens against John Hauser, to recover possession of a lot of land on the north side of Forty-sixth street, in the city of New York. The answer was a general denial. The trial was had before Mr. Justice BARBOUR, and a jury, on the 25th of February, 1863. The defendant objected to various parts of the plaintiff's evidence; and his objections being overruled, took exceptions to the decisions. After the plaintiff rested, the counsel for the defendant moved to dismiss the complaint, on the ground that there was no order sufficiently authorizing the assignee to sell, and that the defendant was in possession hostile to the rights of the plaintiff during the two years allowed him to set up his right of title, and he did not do it, so that this action was now too late.

By consent of counsel, judgment was taken for defendant, subject to the opinion of the court at general term.

John Townshend, for plaintiff.—I. The question is *res judicata* in this court. On a precisely similar state of facts this court ordered judgment for the plaintiff (*Stevens v. Palmer*, Nov., 1862.*)

II. The plaintiff was not barred by lapse of time. The two years' limitation prescribed by section 8 of the United States Bankrupt Law did not apply. This was the express point decided 20th May, 1862, by Judge NELSON in the United States Circuit Court, in the matter of Conant, a bankrupt. The language of Judge NELSON's decision is as follows:

"It is obvious, from a careful perusal of this section, that the limitation only applies to suits growing out of disputes, in respect to property and rights of property of the bankrupt, which came to the hands of the assignee, and to which adverse claims existed while in the hands of the bankrupt, and before the assignment. These disputes of claims affected the assets of the bankrupt, and an adjustment of them, either by compromise or suit, was indispensable to a settlement and distribution of the settlement among the creditors.

* Since reported in 10 *Bosw.*, 60.

"A short bar to suits by limitation, either by the assignee or the adverse claimant, furnished a fit and appropriate remedy against delay, where compromise was impracticable. The last clause of the section seems conclusive in favor of this construction. The time from which the two years' limitation begins to run is the date of the declaration and decree of bankruptcy; or, if the cause of action had not then accrued, two years after it had. The first clause of the limitation could only apply to adverse claims existing before the decree, and the second applies to the same, but provides for the case where the right to institute the suit did not accrue till after the date of the decree."

"The limitation has no reference to suits growing out of the dealings of the assignee with the estate after it came into his hands. These were matters for which he might be made personally responsible, and no reason existed for changing the general period of limitation, any more than in the case of any other trustee dealing with trust property."

"There certainly could be no reason for applying the short term in favor of persons dealing with the assignee, in respect to the estate of the bankrupt, after it came into his hands, and the statute makes the limitation mutual.

"We are of opinion that the limitation in the eighth section of the statute does not apply to the case presented, and shall direct it to be so certified to the district court."

An additional reason for holding the limitation not to apply is, that the statute having been repealed in March, 1843, cannot apply to causes of action arising after that date.

III. If the statute bar applied, the defendant was not in a position to avail himself of it; it was not set up in his answer, and was, therefore, inadmissible on the trial (*Code of Procedure*, §§ 74, 149).

George W. Stevens, for defendants;—Insisted that the exceptions to the admission of evidence were well taken, and also that more than two years having elapsed since the decree of bankruptcy was made, and since the cause of action accrued, this suit could not be maintained (*Bankrupt Act*, § 8; *Paulding v. Lee*, 20 *Ala.*, 753; *Cleveland v. Boerun*, 27 *Barb.*, 252; *S. C.*, 24 *N. Y.*, 613). And that the possession of the defendant was hostile to the title of Tallmadge and Waddell (*Sherry v. Frecking*, 4 *Duer*, 452).

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BY THE COURT.—MONCRIEF, J.—It appears by the case presented upon the hearing of the motion for judgment upon the verdict, that upon the trial of the issues of fact by a jury, this case presented only questions of law, whereupon the presiding justice directed a verdict subject to the opinion of the court at general term, and a verdict pursuant to that direction being rendered for the defendant, the justice ordered that application for judgment on said verdict be made at the general term. In such a case the application for judgment must be made at the general term (*Code of Procedure*, § 265). A verdict having at the trial been directed in favor of the defendant, the rulings thereupon against him cannot be considered upon this motion. "The rule is to examine the decisions made by the (circuit) judge *against* the party who has *lost* the verdict, and to grant or refuse a new trial, according as we find them erroneous or otherwise (*Elsy v. Metcalf*, 1 *Den.*, 323; *Rogers v. Murray*, 3 *Bosw.*, 357).

It appears that on Saturday the 10th day of December, 1842, one Daniel B. Tallmadge was, in the district court of the United States for the Southern District of New York, "declared and decreed a bankrupt pursuant to the act of Congress entitled, "An act to establish a uniform system of bankruptcy throughout the United States, passed August 19th, 1841. And it was furthermore, "ordered by the court that the clerk certify and deliver this decree to William C. H. Waddell, the official or general assignee in bankruptcy, appointed and designated under the rules and regulations of the court." The order of appointment of Waddell above referred to, under date 4th January, 1842, was also read in evidence.

The present action is an action of ejectment, brought by the plaintiff, claiming title to one of several lots of land, being part of what is known as the Hermitage Tract, whereof said Tallmadge was possessed, or in which he had some interest or claim at the time of his being declared a bankrupt, as aforesaid.

Whatever estate, rights or interests were possessed or claimed by the bankrupt (Tallmadge), passed to and became vested in the general assignee by virtue of the decree declaring him a bankrupt, &c. (*Ryerss v. Fawrell*, 9 *Barb.*, 615). The conveyance under which the plaintiff makes his claim so asserts—"I * * * do hereby grant unto the said Bushnell Stevens, his heirs and assigns forever, all the right, title and interest which

the said *bankrupt* had, and which by virtue of the decrees and orders above recited, and of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," as aforesaid *became* vested in me, and which I have a right to convey of, in and to all, &c. * * It did not appear that Mr. Waddell, the general assignee in bankruptcy, had ever asserted a title or made or pretended to have any title, or claim of title, or interest in and to the premises in question, unless the conveyance aforesaid, some nineteen years after the decree of bankruptcy, can be treated as such claim of title.

There was proof that the defendant had been in possession 16 or 17 years.

Judge NELSON, in his opinion in the matter of Conant (MSS., May 20th, 1862) says, * * "A short bar to suits by limitation, either by the assignee or the adverse claimant, furnished a fit and appropriate remedy against delay, where compromise was impracticable. The last clause of the section seems conclusive, in favor of this construction. *The time from which the two years' limitation begins to run, is the date of the declaration and decree of bankruptcy*, or if the cause of action had not then accrued, two years after it had." * * The remaining portion of the opinion not applicable to the present case (as read from the extract upon the plaintiff's points), seems to me to indicate that the question to be determined in that case was whether a claim arising out of dealings made with the assignee after the acquisition of title, possession, &c., was within the limitation, and it was held it was not barred.

In the present case, the cause of action, if any, was perfect at the date of the decree, made in 1842; if at that time Mr. Waddell had gone into possession of this lot claiming title, and the defendant or some other adverse claimant desired to dispute the title of the bankrupt or his assignee, by the plain terms of the act, and following this decision in its interpretation, the action must have been brought within two years, and if not so brought is forever barred.

The decision cited by the counsel for the defendant, while entitled to great weight as expressing the opinion entertained by four of the most eminent jurists in this State, was not the opinion of the court, and cannot therefore be said to be decisive on the point (*Cleveland v. Boerum*, 24 N. Y., 613).

It was not shown that the bankrupt was in possession of the

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premises in question at the time of the making of the declaration and decree of bankruptcy, or indeed that he ever was in possession; there was no proof of possession by the assignee, nor of a claim or pretence of a right of possession; it would seem to furnish some light upon the interest which the assignee presumed the bankrupt had at the time of the making of the decree, that he states in his application for leave to sell and dispose of the "interest which the said bankrupt had, and which became vested in the assignee by the decree aforesaid," that it can be sold only "for a *nominal* consideration, and the costs of the assignee and his counsel therein, and the title hereby sought *being of no pecuniary value* to the estate."

Under such circumstances we think it plain that the plaintiff in this action cannot recover. The complaint was therefore properly dismissed, and judgment should be entered upon the verdict for the defendant with costs.

STAR STEAMSHIP COMPANY *against* MITCHELL.

New York Common Pleas; General Term, April, 1865.

PLEADING.—ACTION OF DECEIT.

A pleading intended to set up "deceit" should contain an averment, in substance, that the representations complained of were "falsely," "fraudulently," or "deceitfully" made, or that the defendant relied on, or was deceived by them. The statement that the person making them knew otherwise, and made the representations "to induce the party to purchase," is not sufficient.

A defect in this respect cannot be cured by amendment after verdict.

The plaintiffs, in February, 1858, brought this action against the defendant for four thousand dollars, being the balance of the price of the steamship "Star of the South," which, in August, 1857, had been sold by the plaintiffs to the defendant for the sum of thirty-two thousand five hundred dollars.

The only defence material to the decision, was an averment

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that three of the owners of the vessel, in order to induce the defendant to purchase it, "represented and stated to the defendant that the engine, machinery and propeller of said vessel was in perfect order, and all complete; that everything was complete, except that the vessel wanted new boilers; and on such representations, and trusting to such statements, the defendant purchased the vessel. * * * That on pumping out some water that was in the vessel, the defendant discovered that the engine was not all complete; that the bed-plate was cracked, and the machinery otherwise badly damaged, and the propeller out of order, and injured. That such injuries were known to the persons who had possession of and owned such vessel, and were concealed from the defendant, and that to repair such injury and damage to the engine and propeller, and make them complete, the defendant expended the sum of fourteen thousand dollars."

There was evidence given to show that the ship had been built in 1853 or 1854, at a cost of one hundred and twenty thousand dollars, and, at the time of her sale to the defendant, was worth several thousand dollars more than the price at which she was sold. Upon the trial it was alleged that Captain Marks had, by his representations, prevented an examination of the bed-plate, etc. It was conceded that the defendant's agent had fully examined the hull, and evidence was given to show that they had abundant opportunity to examine all the machinery, except the bed-plate, etc., which, it was alleged, was under water. The evidence of the plaintiffs showed that the bed-plate could also be seen.

The court charged as follows :

That a buyer is bound to examine what he is about to purchase whenever opportunities for examination are offered him, but there are exceptions to this rule, as where a party takes a warranty or purchase by sample; there is still another exception, as, if the seller be guilty of fraud in effecting the sale, such sale may be avoided. The defendant in this case does not set up a warranty; the defence on which he relies is that of fraud. The steamer and her machinery might have been examined, and it was the duty of the purchaser to examine her, and procure the aid of competent persons for that purpose, or to obtain a special warranty; but if the purchaser, or his assistants, were prevented by artifice, or by any representation on the part of the plaintiff's

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agents from making a complete examination, the purchaser would be entitled to return the vessel, and avoid the sale, or, as he claims in this action, to retain the vessel and deduct enough from the purchase money to compensate himself for any damages he may have sustained.

In this case the first representation relied on by the defendant, is that contained in the schedule.

“Engine department all complete.”

The jury are to pass upon the meaning of the word complete, as applied to the engine department of a steamer in its ordinary and common signification. In that view it means full—indicates that there is nothing deficient; that all the parts are there; not the condition of each particular part, or as to their being new or old, or the degree in which they may be worn, but that they are all there like the different parts of a watch. This is my understanding of that term, but the jury are at liberty to give it their own construction.

But the defendant did not rely upon this representation; he sent his brother with competent assistants to examine the vessel and her machinery. Every part of the machinery was examined except the portion under water, and it is claimed that they were prevented from examining that part of the machinery by the statement of Captain Marks, that it was in perfect condition, or all right, etc. The whole inquiry would, therefore, seem to be confined to the part of the machinery under water, and the representations in respect to it, and if the jury find that any artifice was resorted to on the part of plaintiffs' agents, either by allowing the water to remain in the vessel and cover the bed-plate, or otherwise, or if they should find that the statements of Captain Marks were made for the purpose of deceiving and misleading the defendant and his agents as to the real condition of the machinery under water, or if anything were said by Marks, Stanton, or by any other person to deceive or mislead the defendant, he would be entitled to reduce the amount of the claim against him to the extent of the repairs and damages to that part of the machinery which he was prevented from examining, but the jury must be satisfied that the representations were false, and that they had the effect of misleading the defendants.

But although Captain Marks made statements which were untrue, yet if the jury find that the vessel and her machinery were

worth all that was agreed to be paid for the same by the defendant, in other words, the defendant received the full value of the money, and did not sustain any damage by reason of such misstatements, they, in this action, become of no importance; they would have entitled the defendant to rescind the contract, if he had seen fit, but, as he elected to retain the vessel, he is only entitled to such deduction from the price as will equal the damage he sustained, and in this aspect of the case the jury should take into consideration the testimony as to the value of the steamer at the time of the sale to the defendant.

That these were all questions for the consideration of the jury. If they found that the defendant was defrauded, they would make such a deduction from the plaintiffs' recovery as would compensate him for the condition of and the repairs to the machinery which was under water, and the jury must determine the amount to be allowed to defendant in that event.

The defendant's counsel excepted to that portion of the charge contained in the last two paragraphs.

The jury found a verdict for the plaintiff for three thousand one hundred and twenty-three dollars and fifty-seven cents, being the deduction of one thousand three hundred and thirty-five dollars and seventy-five cents, from the amount claimed by the plaintiff.

From the judgment entered upon the verdict, the defendants appealed.

Beebe, Dean & Donohoe, for appellants.—I. The court erred in the statement of the rule of damages. The correct rule is, that the damage is the difference between the value, if the ship was as represented at the time of the sale, and the actual value at that time, with the defects proved (*Voorhees v. Earle*, 2 *Hill*, 288; *Cary v. Gruman*, 4 *Hill*, 625; *Muller v. Eno*, 14 *N. Y.* [4 *Kern*], 597). That is the rule of damages in case of sale with warranty, and there is no reason for any different rule when the purchaser has been induced to enter into a contract by the known false representations of a party as to the condition of the article purchased. The law gives to the person who has been induced to purchase by false representations, the right to rescind; but where, as in this case, he could not rescind, it does not offer, as a premium to fraud, the certainty of no loss, and the chance of keeping more than the value, nor does it prevent a purchaser

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from a fraudulent vendor from making a profit. The action is on a contract; the defence is a breach of that portion of the contract which represented the quality or condition of the article purchased. It is fundamental, that "the contract itself furnishes the measure of damages" (*Sedgwick on Damages*, 200; 2 *Parsons on Contracts*, 44). If the damage is limited to the expense of repairing, he loses the whole use of his vessel during the time, and the interest on the money paid (*Driggs v. Dwight*, 17 *Wend.*, 71).

II. The counter-claim in this case is on a warranty, if an action on the case had been brought on it—averring the warranty and the scienter—the rule of damages would have been the same as if on the warranty in assumpsit (*Sedgwick on Damages*, 206). (a) No particular form of words is necessary to constitute a warranty; any declaration made by the vendor during the negotiation for the sale on which the purchaser relies, in reference to the condition of the article sold, is a warranty (1 *Cow. Trea.*, 313; 1 *Parsons on Contracts*, 462). (b) Parties often elect as to whether they will bring case or assumpsit; but if the action is on a contract, though in form for a tort, the rule of damages is as in cases for breach of contract (*Campbell v. Perkins*, 8 *N. Y.* [4 *Seld.*], 430; *Trull v. Granger*, 8 *N. Y.* [4 *Seld.*], 115).

III. The rulings of the court on the admissibility of evidence were founded on the same theory as to the rule of damages as the charge, and for this reason erroneous.

Martin & Smith, for respondents.—I. There was no error in any ruling upon the admission or rejection of evidence. It was alleged that the defendant was deceived in respect to the state of the machinery. In answer, it was certainly competent to prove that he knew, or must have known, that it was in a very bad state. The effect of the employment of the ship, all of which was known to the defendant, was competent for this purpose.

II. The charge correctly stated that the defendant did not set up any warranty, but relied upon the defence of fraud, and left it to the jury to construe the phrase, "Engine department all complete," to which there was no objection. It then told the jury, in substance, that if Captain Marks' statements were not true, as to the state of the machinery, that circumstance was not material, if the defendant sustained no damages by reason there-

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of, but that even then the defendant might have rescinded the contract. The exceptions to the charge cover essentially the same ground. The point is the same, whether the party complaining is plaintiff or defendant. A party cannot recoup unless he has a cause of action upon which he may maintain an action as plaintiff. If the plaintiff were suing, his action would be "deceit." In such an action it is perfectly well settled that two things must concur, or no action will lie, viz.: fraud and damage. Neither, without the other will avail. It is no answer to this to say that a jury may, in a proper case, give a sum in addition to the actual damage, as smart money. So they may—but they cannot do this until, first, the cause of action is made out—until both the fraud and the damage are proved. The charge, in effect, says, that deceit will not lie unless the party complaining has been injured thereby, and the charge was right. And if deceit will not lie, the same facts will not make a good recoupment (Per BULLER, J., *Pasley v. Freeman*, 3 *T. R.*, 51-56; also, pp. 61, 62, 64; *Benton v. Pratt*, 2 *Wend.*, 389; *White v. Merritt*, 7 *N. Y.* [3 *Seld.*], 352-356, *citing the cases above from 2d Wend.*; *Upton v. Vail*, 6 *J. R.*, 181; *Addington v. Allen*, 11 *Wend.*, 374).

III. There is another technical, but none the less conclusive answer to these exceptions. It is, that the answer stated no case under which the defendant was legally entitled to give proof of false representations. To make the answer good for this purpose, the defendant must aver that the representation was made with intent to deceive and defraud. It was so held in *Addington v. Allen*, even after verdict (11 *Wend.*, 374). The precedents contain the words "falsely, fraudulently and deceitfully represented," and these words are essential (2 *Chitty's Pleadings*, 703, 704; *Young v. Covel*, 8 *J. R.*, 23; *Cropsey v. Robinson*, 5 *Leg. Obs.*, 20; 1 *Bab. Ac., tit. Actions on the Case*, p. 125, f). Before the Code, the point would have been too plain for argument. Now there is only room for discussion upon the question whether § 173 of the Code is applicable. And upon that it is clear, that no power exists to amend a pleading after judgment, so as to make the judgment erroneous. To sustain a judgment, the court will "conform a pleading to the facts proved," but not to overthrow it (*Williams v. Hall*, 6 *Bosw.*, 674, 678; *Gasper v. Adams*, 24 *Barb.*, 287; *Englis v. Turnis*, 3 *Abb. Pr.*, 82; *Brazil v. Isham*, 2 *N. Y.* [2 *Kern.*], 17; *Field v. N. S.*—Vol. I.—26.

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The Mayor of New York, 6 *N. Y.* [2 *Seld.*], 179, 189; *Brown v. Colie*, 1 *E. D. Smith*, 226, 270).

IV. The court, in substance, told the jury, that if the representation did not influence the defendant, he was not entitled to recover upon it; and so is the reason of the thing, and so are the authorities (*Bronson v. Wiman*, 8 *N. Y.* [4 *Seld.*], 182, 186, 188, 9). The point before made, is equally applicable to this exception, viz.: no proof of false representations was admissible under the answer.

CARDOZO, J.—That a declaration in an action for deceit must, under the common law system of pleading, contain an allegation that the representation was falsely or fraudulently made, is too well-settled to admit of cavil (see 2 *Chitty Pl.*, 703, 704; *Evertson v. Miles*, 6 *J. R.*, 138; *Young v. Covel*, 8 *J. R.*, 23; *Cropsey v. Robinson*, 5 *Leg. Obs.*, 20; 1 *Bac. Ab.*, *Tit. Actions on the Case*, 125, F.; *Allen v. Addington*, 11 *Wend.*, 374).

In the last mentioned case it was held that, even after verdict, a declaration in such an action would be fatally defective if it did not contain that averment.

In *Zabriskie v. Smith* (13 *N. Y.* [3 *Kern.*], 322), DENIO, J., adverting to the rule which I have mentioned, and commenting upon *Allen v. Addington*, said: "Under our present system of pleading, I conceive that a complaint should contain the substance of a declaration under the former system."

He holds that, although the concise averments given in the form-books would be better pleading, and more in accordance with the spirit of the Code, yet, if the language employed, though artificial by reasonable intendment, makes out an allegation of bad faith and evil intention, it will be sufficient. Tested by this rule, I think the answer of the defendant is fatally defective; and that, under it, the defendant could not claim to give proof of false representations.

If this be so, it will be unnecessary to examine the other questions presented on the argument.

The answer in this case, which, of course, must contain all that would be necessary to make a perfect complaint for deceit, does not contain any averment that the representation or the concealment of fact charged was with any false or fraudulent intent, nor any language from which such an intent can fairly be inferred. In *Zabriskie v. Smith*, the averment was that the

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representation made by the defendant, was "false and deceitful," and that the defendant knew the plaintiffs would rely on it, and that they did in fact rely upon it, and would not have trusted the debtor, had not the representation been made. Taking all the averments together, that complaint was held to be good. But the answer in this case is very different. It avers that the injuries complained of were known to the parties having possession of the vessel, and were concealed from the defendant. But whether such concealment was fraudulent or honest, as it may very well have been, is not averred. Nor does the answer say that the representations alleged were either "falsely," "fraudulently," or "deceitfully" made, or that the defendant either relied upon or was deceived by them. It only charges that the representations were made "to induce" the defendant to purchase, but it is not averred that they had that effect, or that the defendant would not have bought, had the representations not been made, or had no concealment been had; nor, indeed, but that, notwithstanding the representations and the concealment, the defendant perfectly well knew the condition of the machinery.

Such an answer is, I think, entirely defective, whether judged by the rules of common law pleadings or the more lax ones prevailing under the Code.

The power of amendment does not aid the defendant. An amendment after trial may be made to sustain the judgment, but not to reverse it. The cases on this point are collated and reviewed in *Williams v. Hall* (6 *Bosw.*, 674).

For these reasons I think the judgment should be affirmed, with costs.

BRADY, J.—In addition to what Judge CARDOZO has said in his opinion, I deem it proper to say that in this case the alleged improper statements of Captain Marks related only to the bed-plate which was broken, assuming those statements to have been made under such circumstances as would make the plaintiffs liable for their falsity. The other parts of the vessel and her machinery were accessible to the defendant's agents sent to examine them, and upon whose report he determined to purchase. For the expense of repairing or replacing the bed-plate the jury made the defendant an allowance, and substantial justice has been done in this case. The whole case warrants no

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charge of fraud against the plaintiffs, and none was averred in the answer, as suggested by my associate. The defendant's requests to charge, and the exceptions taken, were based upon an element not present, which is a sufficient answer to them, but aside from that, the charge contained all the propositions in the defendant's favor, to which he was entitled.

The judgment should be affirmed.

DALY, J., concurred.

PEOPLE *against* MANHATTAN GAS LIGHT COMPANY.

Supreme Court, First District; General Term, November, 1865.

MANDAMUS.

Where a gas-light company have, by law, the exclusive right and duty of furnishing gas to the public, a mandamus lies, on the relation of an individual whom they refuse to supply, to compel them to do so.

But the writ should not be issued to compel them to supply one against whom they hold a judgment for gas bills, although they have supplied him for a time, without objection, since such judgment was recovered, and though he allege insolvency, and deny liability upon the judgment.

APPEAL from an order denying a motion for a mandamus.

The relator, De Lancey Kennedy, applied for a mandamus against the Manhattan Gas Light Company of the City of New-York, to compel them to supply his building with gas. The grounds of the application and the defence are fully stated in the opinion.

Timothy Cronin, for the relator, appellant.

T. M. Adams and *B. W. Bonney*, for the respondent.

BY THE COURT.*—INGRAHAM, P. J.—I think there can be no

* Present, INGRAHAM, P. J., LEONARD, and BARNARD, JJ.

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doubt about the authority of this court to direct the respondents to furnish gas to persons who under provisions of their charter have a right to receive it, and who offer to comply with the general conditions on which the company supply others.

They possess, by virtue of their charter, powers and privileges which others cannot exercise, and the statutory duty is imposed upon them to furnish gas on payment of all moneys due by such applicants.

We are left, then, to inquire whether the relator was in a condition to demand from the company this supply.

It appears by the papers used on the motion, that the relator commenced taking gas in 1858, at No. 61 Seventh Avenue, and was supplied with gas by the company until the 28th of December, 1861; that he paid for the gas so received up to the 19th of August, 1861, and that for gas furnished after that date he has not paid.

It also appears that in January, 1865, the respondent sued the relator, and obtained judgment against him for the amount due therefor, which still remains unpaid.

In May, 1864, the relator applied to the company for gas at 121 West Sixteenth street, which was furnished to him by the company without objection, on account of the former indebtedness, until the 9th of February, 1865, when the company shut off the supply of gas, and refused to furnish any more. It also appears that the relator, in answer to claim of payment of the indebtedness, represents himself insolvent and unable to pay the judgment.

There is nothing in the charter of the company which requires them to make the objection that the applicant was indebted to them at the time of the first application.

It would be unreasonable to suppose that in every instance they could ascertain such indebtedness. If at any time the party is so indebted, the company may refuse to furnish, and more especially should this be so, when the relator avows his insolvency and his inability to pay for gas furnished previously.

The attempted denial of liability for this bill by the relator will not aid him. The company have obtained a judgment against him. This is not disputed, and no attempt is made by him to set it aside.

So long as that remains in force, it is conclusive against him. The order appealed from should be affirmed, with ten dollars costs.

WALKER *against* THE GRANITE BANK.*Supreme Court, First District; Special Term, October, 1865.*

PLEADING.—AMENDMENT.

In an action to recover securities pledged, on the ground that the amount for which they were pledged had been paid, an answer alleging that the amount had not been paid, but that a large sum still remains unpaid, is not obnoxious to a motion to make it more definite and certain. A simple denial that all the money for which the securities had been pledged had been paid would have been enough.

Where an amended complaint is served in pursuance of leave given by the court, a new answer becomes necessary; and the time within which to move to compel an amendment of the answer runs from the time of filing it.

Motion by plaintiff to require the defendants' answer to be made more definite and certain.

Martin & Smith, for the motion.

I. T. Williams, opposed.

INGRAHAM, P. J.—The portion of the answer which sets out special causes why the gratuity was not voted by the directors, should not have been inserted in the answer. The general allegation that the services were of no value to the defendants is proper, but all the rest is mere evidence to prove the truth of the foregoing allegation.

The application to have the defendant state in the answer how much is due to the defendants from Holbrook, is denied. It is very immaterial what the amount is. The plaintiff claims to recover the securities on the ground that the amount for which they were pledged had been paid in part by collections and in part by sales. The defendants answer that the amount has not been paid, but that a large sum still remains unpaid. I do not think the plaintiff has any right to require this allegation to be made more specific by stating the amount actually unpaid. That must be matter of proof on the trial. . The issue could have been as well formed by a simple denial that all of the

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moneys for which the securities had been pledged, were paid to the defendants.

The objection that it is too late to make the motion is not well taken. The leave to serve an amended complaint destroyed the further pleadings, and rendered a new answer necessary. The time within which to move to amend the answer, runs from the filing of it.

Motion granted in part, as above stated.

LANE *against* BAILEY.

Supreme Court, First District; General Term, November, 1865.

APPEAL.—NEW TRIAL.

An appeal from an order denying a motion for a new trial may be taken after judgment has been entered, as well as before.

The case of *Soverhill v. Post* (22 *How. Pr.*, 386), opposed.

Where an appeal is taken from a judgment, and there has been an appeal, also, from an order denying a new trial, it is the better course to hear both appeals together.

Motion to dismiss an appeal.

In this action, which was brought by Robert Lane, and another, the plaintiffs recovered a verdict. The plaintiffs entered judgment upon the verdict; and the defendants, having moved for an order for a new trial upon the judge's minutes, which was denied, appealed from the order denying it, making a case, and serving it in the usual way, but without taking any appeal from the judgment.

When the appeal came on before the general term in February, 1865, the plaintiff's counsel moved to dismiss the appeal, as being too late after judgment; and the motion was granted, the

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court, *per* INGRAHAM, J., holding that a motion for a new trial on the judge's minutes, made at the circuit, is not such a motion as requires a formal entry of an order on its denial. It is all with the trial merged in the judgment. The appeal should be from the judgment, and not from the denial of the motion by the judge.

The appeal was accordingly dismissed with the remark that it was evident, from the papers, that the defendants had resorted to this proceeding to cure their neglect to appeal from the judgment, and they should not be allowed to do, indirectly, what the law has forbidden.

The defendants applied for, and obtained leave to re-argue the motion to dismiss the appeal, and the re-argument was had at the general term in November, 1865.

S. T. Freeman, for the plaintiff, respondent.

T. Cronin, for the defendant, appellant.

BY THE COURT.*—LEONARD, J.—The second subdivision of section 349, gives the right of appeal from an order denying a motion for a new trial.

No qualification is imposed limiting the right to cases where the judgment has not been entered.

This subject was considered at general term in the sixth district (13 *Abb. Pr.*, 389; S. C., 22 *How. Pr.*, 385; *Pumpley v. The Village of Oswego*). The right to appeal was there upheld in a similar case to the present.

On the next page of the same volume of HOWARD occurs the case of *Soverhill v. Post*, decided in the third district, where a contrary rule was held, but, as it seems to me, on very insufficient reasons.

The court consider the appeal in the latter case as nugatory, because the judgment will not be affected by the decision on the appeal, even should the verdict be set aside.

With great respect, I differ.

Should the verdict be set aside, the special term can, on motion, vacate the judgment, as it will then have no foundation.

Where an appeal is taken from a judgment, and there has been an appeal, also, from a denial of motion for a new trial on

* Present, INGRAHAM, LEONARD and BARNARD.

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the judge's minutes, we think it the better course to hear both appeals argued on the appeal from the judgment.

By section 329 of the Code, all intermediate orders may be reviewed on the appeal from the judgment, and the facts, as well the law, may, under such circumstances, be reviewed.

The motion to dismiss the appeal should be denied, but without costs.

HAVILAND *against* KANE.

Supreme Court, First District; Special Term, November, 1865.

EXECUTION AGAINST THE PERSON.—MOTION FOR SUPERSEDIAS.

Where a defendant has been arrested in the action, the three months within which the plaintiff must charge him in execution, is from the last day of the special term for non-enumerated motions, following that at which judgment was obtained.*

* In *Dusart v. Delacroix*, (*Supreme Court, First District, Special Term, 1864*), it was *Held*, that where the execution is for more than five hundred dollars, a defendant applying for a discharge under the statute, must have been three months *charged in execution*. It is not enough that his imprisonment under the execution and the order of arrest has continued for three months.

This was a petition by the defendant to be discharged from imprisonment. It appeared that the defendant was arrested under an order in this action on the 29th of July, 1862, and had ever since been in custody. Judgment was entered on the 9th of May, 1863, for sixty-six thousand four hundred and forty-four dollars and seventy-nine cents, and on the 9th of October 1863, the defendant was charged in execution. On the 19th of December, 1863, the defendant served notice on the plaintiff's attorney that on the 4th of January, 1864, he would present the present petition, and apply for a discharge.

C. L. Spilthorn and John B. Fogarty for the plaintiff, opposed the application on the ground that the defendant had not been three months in custody under the execution as required by the statute.

James M. Smith and H. F. Averill, for the defendant, contended that it was not necessary that the defendant should have been three months charged in execution, but that it was sufficient that he should be charged in execution and in prison under that and the order of arrest for that period.

BARNARD, J., stated that he had examined the statute with great care

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Motion for a *supersedeas*.

In this action, which was brought by John S. Haviland against Peter Kane, the defendant was arrested, and not charged in execution after judgment had against him. He now moved for a *supersedeas*.

O'Gorman & Wilson, for the motion.

A. J. Dittenhoefer, for the plaintiff, opposed.—I. The motion is premature. This is a technical proceeding, and the defendant must bring himself within the strict letter of the law. The following is the provision of the statute :

"1. When a defendant against whom an order of arrest has been obtained, is at the time judgment is rendered, in custody of the sheriff, the plaintiff must charge him in execution within three months from the last day of the term *next* following that at which judgment is obtained" (2 *Rev. Stat.*, 556, §§ 36, 37).

If the word "term" in the statute be held to mean what the legislature, at the time of the passage of the law, understood by the word, at that time the word "term" was only applied to a court when it sat in banc. Judgment was entered in this action on the 30th day of June, 1865. The statute says the defendant must be charged in execution within three months from the last day of the term *next* following that at which judgment is obtained.

II. Judgment is generally obtained either at the term of the circuit or special term (trial without a jury), and therefore, it must mean either one or the other of these terms. It is no term of this court within the meaning of this statute, when a justice sits at chambers to hear motions. It means a term of this court where issues are tried *by the court* and judgment is rendered upon them. (a) A term is the space of time during which a court holds a session; sometimes the term is a monthly, at others it is a quarterly

and had submitted the question to some of his associates, and after consultation they were unanimously of the opinion that where the execution is for more than five hundred dollars, a defendant applying for his discharge under this statute must have been three months charged in execution before he can make this application; and that as the defendant in this case was so charged for more than five hundred dollars, and had not been in custody under the execution for three months when he presented the present petition, the application must be denied.

period, according to the constitution of the court (*Bouvier's Law Dictionary*).

III. Three months have not yet elapsed since the last day of the term next following that at which judgment was obtained. This court was not sitting in July, August or September, 1865; there was not "term" held in those months within the meaning of the statute. The first term of this court since the entry of judgment in this action was October. It is contended by the counsel for defendant, the word term in the statute should be held to apply to the branch of the court where the judge sits at chambers. The whole statute becomes ambiguous and uncertain. From what term shall the three months be calculated? from the term at chambers, the special, general term, or circuit? To avoid confusion, as to what is meant by the "term" the construction must be that the term meant is the one that existed at the time of the passage of this law, or the one at which issues are tried.

IV. The defendant has a perfect remedy. He can apply to the court to compel plaintiff to issue execution.

V. The courts have always strictly construed the provisions of this statute (see *Lippman v. Petersberger*, 9 *Abb. Pr.*, 209; *S. C.*, 18 *How. Pr.*, 270).

CLERKE, J.—We are to presume, of course, that the legislature had a special purpose in allowing a term to intervene before a defendant, who is in custody of the sheriff at the time judgment is rendered against him, can move for a supersedeas, on the ground that the plaintiff has not charged him in execution. What was this purpose? Obviously to enable either party to make any motion, which the condition of the case, or of the parties, should render allowable or necessary. At the time the statute was enacted—April 19, 1813 (1 *Rev. Stat.*, 353, § 12; 2 *Rev. Stat.*, 256, §§ 36, 37)—motions of any kind could be heard only at one of the four general terms of the court. Afterwards, indeed, in 1830, special terms were established for the purpose of hearing and deciding, during the vacations intervening between the general terms, all such non-enumerated business as may arise, except such as the court should by rule direct to be heard at the general term. But, at the time at which the statute to which I have referred, was first enacted, and at the time it was copied by the revisors of the Revised Statutes, there were only those four general or calendar terms, at which the justices sat in banc, and at which

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alone, as I have said, motions could be made. The practice now, however, is entirely altered. Terms for non-enumerated motions are heard during every month in the year. So that the purpose which induced the legislature to allow a term to intervene before a defendant in custody could move for his discharge, is now satisfied every month, instead of every three months, as formerly. The provision must be construed so as to conform to the present system, and not to one which no longer exists. There could be no adequate object now for allowing a general term to intervene before a defendant could move for his discharge; because no motion relating to the action could be made at a general term. On the contrary, the special term is the branch of the court, where alone such motions can be made; and the period within which the plaintiff must charge the defendant in execution, is from the last day of the special term for non-enumerated motions, following that at which judgment was obtained. In the present case this was, at the farthest, the 5th day of August, being the Saturday preceding the first Monday in August. More than three months have elapsed from that day; and, as the plaintiff has neglected to charge the defendant in execution within that time, he must be discharged.

The motion is granted.

BANK OF COOPERSTOWN *against* CORLIES.

Supreme Court, Sixth District; General Term, July, 1866.

JUDGMENT AGAINST EXECUTORS.—PLEADING.—FRIVOLOUS ANSWER.—JOINT APPEAL.

Where executors or administrators are sued on a debt of their decedent, judgment for the plaintiff should be in terms that the plaintiff recover against them the sum mentioned in it, to be levied of the goods and chattels, &c. in their hands, as executors, &c.

When a joint answer of several defendants denies an allegation in the complaint, which the plaintiff must prove to establish his cause of action against some of the defendants, but which he need not prove to entitle him to recover against the others, the answer raises a material issue for the defendants as to whom the plaintiff must prove such allegation.

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Such answer, therefore, cannot be held frivolous.

Thus, where the plaintiffs, suing on a partnership debt, join the executors of a deceased partner and the surviving partners as defendants, and allege the insolvency of the latter, a joint answer denying the insolvency is not frivolous as to all the defendants.

It is not necessary, in order to make such answer available to the executors, that it should take an objection to the misjoinder of defendants.

It seems, that all the defendants may join in an appeal from a judgment against them on their joint answer, as being frivolous, if it be sufficient as respects some of them.

Appeal from an order striking out an answer as frivolous, and from the judgment for plaintiffs entered thereon.

This action was brought by the Bank of Cooperstown against Joseph W. Corlies, Jr., Jonas G. Dudley and Frederick Jacobson, survivors of the firm of Joseph W. Corlies & Co., and Lydia L., Joseph W., Alfred W. and Edward L. Corlies, executors, &c., of Joseph W. Corlies, deceased. The allegations of the complaint were as follows :

The above-named plaintiff, a corporation duly incorporated or organized under article 5, of chapter 18, part 1, title 2, of the Revised Statutes of the State of New York, entitled, "Of Banking Associations and Private Bankers," located and doing business in the county of Otsego, alleges and shows to this court, that, for several years previous and down to the month of October, 1860, the defendants, Joseph W. Corlies, Jr., Jonas G. Dudley, Frederick Jacobson, and one Joseph W. Corlies, were co-partners, doing business in the city of New York, under the firm-name and style of Joseph W. Corlies and Co.

That, as such co-partners, they became indebted to one William M. Clinton, of Hartwick, in the county of Otsego, in the sum of four thousand and eleven dollars and fifty cents, or upwards, for goods, wares and merchandise sold and delivered to said co-partners, or advanced to such co-partners, to be sold on commission, and which were sold by them, and the proceeds of such sales never paid over to the said Clinton.

That by the original articles or contract of co-partnership, the executors of the said Joseph W. Corlies, in case of his death, were to have and did have the right to continue the co-partnership on the part of the said Joseph W. Corlies, and to take his place and be substituted for him in the said co-partnership busi-

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ness, and the said co-partnership business to continue, the same as before the death of the said Joseph W. Corlies.

That in the month of October, 1860, the said Joseph W. Corlies died, and his executors elected to go on with the co-partnership business under the same firm-name and style, according to the terms of the said articles or contract of co-partnership, and assumed the indebtedness of the original co-partnership to the said William M. Clinton.

That, in the month of April, 1861, the said co-partnership was duly dissolved, and the said firm, or the members thereof, proceeded to wind up the partnership business, and settle up the debts and liabilities of the said firm.

That, on the 18th day of January, 1862, the said William M. Clinton made his certain draft or bill of exchange in writing, dated on that day, and directed to Joseph W. Corlies & Co., and thereby required them to pay to the order of the said William M. Clinton, the drawer, three months after the date thereof, the sum of four thousand and eleven dollars and fifty-five cents, and the said draft was afterwards, for value received, duly accepted by the said members of the dissolved co-partnership, or by the defendant, Joseph W. Corlies, Jr., who was the member of the firm deputed and empowered by the firm to settle up the business and pay off the firm debts, and all the liabilities of the said co-partnership, and who was a member of the said firm, and also one of the executors, &c., of the said Joseph W. Corlies, deceased, and that the same was duly accepted in the name of the said co-partnership, and in liquidation of the said indebtedness of the said co-partnership to the said William M. Clinton. -

That afterwards, and before the said bill or draft became due, the same was duly endorsed by the said payee, William M. Clinton, and one Russel Leonard, and W. F. Leonard, and for value received, duly transferred to this plaintiff, who is now the lawful owner and holder thereof.

That the said draft or bill was duly presented at maturity for payment, and payment thereof refused, and that the same was thereupon duly protested; the cost of which protest was the sum of eighty-one cents. This plaintiff further says, that the said draft or bill of exchange has not been paid, or any part thereof, but that the whole amount thereof still remains due and unpaid.

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The plaintiff further says, the defendants, Joseph W. Corlies, Jr., Jonas G. Dudley and Frederick Jacobson, survivors as aforesaid, are, and each and every one of them is, wholly and entirely irresponsible and insolvent, and has no property which can be reached by judgment and execution, either legal or equitable, and that the said firm has no assets out of which the said debt to this plaintiff can be satisfied, in whole or in part; but that the estate of the said Joseph W. Corlies is solvent, and has more than sufficient assets out of which to satisfy the claim of this plaintiff; and that the said defendants, Lydia L. Corlies, Joseph W. Corlies, Jr., Alfred W. Corlies, and Edward L. Corlies, are the executors of the last will and testament of the said Joseph W. Corlies, deceased, duly appointed, and to whom letters testamentary have been duly issued, and who have been, and still are, acting as such executors, as this plaintiff is informed and believes.

Wherefore, the plaintiff demands judgment against the defendants in this action for the sum of four thousand and eleven dollars and fifty-five cents, together with eighty-one cents protest fees, and interest on the whole from the 18th day of April, 1862; and the decree of this court that said judgment be a charge upon the estate of the said Joseph W. Corlies, deceased, and that the said executors be decreed to pay the same to this plaintiff, together with the costs of this action, or for such other or further order as to the court may seem meet and proper in the premises.

The defendants all joined in one answer, which among other things denied the allegations as to the right to continue the partnership, and the actual continuance of it, and the assumption of the indebtedness, and also the allegation that the surviving partners, defendants, were irresponsible and insolvent. The answer also contains new matter relied on as constituting a defence, which it is not material to state for an understanding of the points decided on the appeal.

The plaintiff made a motion, at the Tioga special term of this court in March, 1866, for judgment, on the ground that the defendants' answer to the complaint was frivolous—which motion was granted, and judgment was thereupon rendered in favor of the plaintiff against the defendants jointly, for five thousand one hundred and fifty-three dollars and thirteen cents damages and costs.

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The defendants appealed from the order and judgment to the general term of this court.

Lynes & Bowem, for the plaintiffs.

J. Solis Ritterband, for the defendants,—Cited, as to what is frivolousness in pleading, *Hall v. Smith*, 8 *How. Pr.*, 150; *Nichols v. Jones*, 6 *Id.*, 358; *Sixpenny Savings Bank v. Sloan*, 2 *Abb. Pr.*, 414; and see 12 *How. Pr.*, 544. And as to the materiality of the denial of insolvency, *Voorhies v. Baxter*, 18 *Barb.*, 592; and 1 *Abb. Pr.*, 43; *Voorhies v. Childs*, 17 *N. Y.*, 354; *Code of Procedure*, § 147; *Hornfager v. Hornfager*, 6 *How. Pr.*, 279; 2 *Whitt. Pr.*, 54, 55.

BY THE COURT.*—BALCOM, J.—The complaint shows that the firm of Joseph W. Corlies & Co., were indebted to William M. Clinton for goods, wares, and merchandise, which the latter sold to the former: that Clinton drew on Corlies & Co. for the debt, after the death of Joseph W. Corlies; that the draft was accepted by the defendants, including the executors of the deceased member of the firm; and that Clinton afterwards endorsed the draft and transferred it to the plaintiff: that the survivors of the firm (who are made defendants), are, and each and every of them is, wholly and entirely irresponsible and insolvent, and have no property which can be reached by judgment and execution, either legal or equitable; and that the firm have no assets out of which the debt to the plaintiff can be satisfied, in whole or in part. There is no allegation in the complaint that the debt, for which the draft was given, has been transferred or assigned to the plaintiff. The executors of the deceased member of the firm are made defendants; and judgment is demanded in the complaint against the defendants for the amount of the draft with interest, and notary's fees for protesting the draft; and a decree is also demanded in the complaint that the judgment be a charge upon the estate of Joseph W. Corlies, deceased, and that his executors be required to pay the judgment to the plaintiff with costs.

The defendants answered jointly; and in their answer they denied the allegations in the complaint as to the insolvency of the survivors of the firm of Corlies & Co.

* Present PARKER, MASON, BALCOM and BOARDMAN, JJ.

The judgment rendered in the action is erroneous, for the reason that it is against the executors of Joseph W. Corlies deceased personally, and is not that the plaintiff recover against them the sum mentioned in it, to be levied and collected of the goods and chattels, &c., in their hands as executors, &c.; and it is a joint judgment against all the defendants personally.

The denial, in the answer, of the allegations in the complaint as to the insolvency of the survivors of Corlies & Co., though made by all the defendants jointly, formed a material issue between the plaintiffs and the executors of the deceased member of the firm. It is well settled that the personal representatives of a deceased partner cannot be joined as a party defendant, with the surviving partner, to an action for a partnership debt, where the complaint does not show the plaintiff's inability to procure satisfaction from the survivors. And when the complaint shows that fact, the plaintiff must prove it to entitle him to recover against such representatives (*Voorhies v. Childs' Executor*, 17 *N. Y.*, 354; *Tracy v. Suydam*, 30 *Barb.*, 110; 18 *Id.*, 592; 16 *Id.*, 289; 11 *Paige*, 80; *S. C.*, 2 *Den.*, 577; 8 *N. Y.* [4 *Seld.*], 362; 2 *Sandf. Ch.*, 573; 2 *Johns. Ch.*, 508; 1 *Cai. Cas.*, 122).

The judge at the special term was of the opinion that the denial in the answer, of the allegations in the complaint of the insolvency of the survivors of the firm of Corlies & Co. was "meaningless," for the reason that there was no defence of misjoinder of defendants. But I am of the opinion that no such defence was necessary by the representatives of the deceased member of the firm; for if there be a misjoinder of defendants the plaintiff must still prove that the survivors of the firm are insolvent before any judgment can be rendered against the representatives of the deceased member. When too many persons are made defendants none of them, against whom a cause of action is alleged in the complaint, can demur to it, for a defect of parties defendants (*Churchill v. Trapp*, 3 *Abb. Pr.*, 306; 17 *N. Y.*, 592).

If the complaint fails to show a cause of action against the executors of Joseph W. Corlies deceased, as acceptors of the draft in question, or for the reason that there is no allegation in it that the demand, for which the draft was given, has been transferred to the plaintiff, the executors may take advantage

of such defect upon the trial (*Higgins v. Rockwell*, 2 *Duer*, 650).

The denial of insolvency referred to formed no material issue between the plaintiff and the surviving members of the firm of Corlies & Co., for the reason that the former need not prove the latter were insolvent to recover against them, if a recovery can be had in the action against all the defendants. But I am of the opinion that the fact that the survivors of the firm united with the executors of the deceased member in denying the alleged insolvency of the former, did not render such denial by the latter frivolous. It is, notwithstanding, a denial, by the executors, of a material allegation in the complaint, which the plaintiff must prove, or the executors will be entitled to a dismissal of the complaint. And no authority need be cited to show that an answer is not frivolous which traverses a material allegation in the complaint. A frivolous answer is one, which, assuming its contents to be true, presents no defence to the action. An informal answer, if it presents a defence, is not frivolous (5 *Abb. Pr.*, 453; 9 *Id.*, 23). And I am of the opinion that a joint answer of several defendants, that presents a defence to the action for one defendant, by a denial of a material allegation in the complaint, should not be adjudged frivolous as to all the defendants. I am aware of the rule that existed prior to the Code of Procedure,—that if two or more persons joined in a special plea, which was sufficient for one, but not for the others, the plea was bad as to all (see *Grah. Pr.*, 2d ed., 241 and 242). Perhaps this rule is applicable to answers under the Code setting up new matter for a defence. But under the Code, denials, in the answer, of material allegations in the complaint, are a substitute for the plea of the general issue under the old system of pleading (*McKyring v. Bull*, 16 *N. Y.*, 297); which plea, though jointly interposed by several defendants, was good in all cases, for either defendant against whom the plaintiff failed to establish a cause of action. And I am of the opinion that when a joint answer of several defendants denies an allegation in the complaint, which the plaintiff must prove to establish his cause of action against some of the defendants, but which he need not prove to entitle him to recover against the others, the answer must be held good at the trial for the defendants as to whom the plaintiff must prove such allegation.

Whether, where such a defect in the answer appears upon the

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face thereof, the plaintiff can demur to it under section 153 of the Code, need not be determined.

The motion in this case was for judgment, on the ground that the answer was frivolous as to all the defendants; and it was adjudged to be so at the special term, and all the defendants have jointly appealed from the order and judgment of the special term. I think they had the right to join in the appeal (see *Grah. Pr.*, 2d ed., 937; *Id.*, 960; 11 *Wend.*, 174); though it is probable the executors of Joseph W. Corlies, deceased, could have appealed alone (see *Code of Procedure*, § 325; *Mattison v. Jones*, 9 *How. Pr.*, 152). But the point that the defendants could not join in the appeal has not been taken.

My conclusion is that the order and judgment declaring the answer frivolous should be reversed, with costs; and that the plaintiff's motion for judgment for the alleged frivolousness of the answer should be denied, with costs.

Ordered accordingly.

JANANIQUE *against* DE LUC.

New York Common Pleas; General Term, February, 1865.

ARREST.—APPEAL.

The right to arrest the defendant, in an action brought to recover possession of specific personal property, depends, not on the character of the cause of action, but on the question whether the defendant has disposed of the property so that it could not be found by the sheriff, or with intent to defraud the plaintiff of it.

Hence, the ground of arrest in such an action may be tried on the affidavits, and if, on a motion to vacate the arrest, the affidavits are conflicting on this point, the decision of the motion will not be reversed on appeal.

Appeal from an order vacating an order of arrest.

This was an action brought by Theophile Jananique to recover a piece of lace, and thirty dollars damages for the unlawful detention thereof by defendant, Isabella De Luc.

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An order of arrest against the defendant was granted upon an affidavit stating the cause of action, and that the goods were concealed so that the sheriff could not find them.

Defendant moved to vacate the order of arrest upon affidavits denying the possession of the goods, and declaring that no requisition had been made to the sheriff to demand the same.

At special term, September 16, 1864, after argument, Judge DALY vacated the order of arrest.

The plaintiff appealed to the court at general term.

F. H. B. Bryan, for the plaintiff, appellant.

F. R. Coudert, for the defendant, respondent.

BY THE COURT.—CARDOZO, J.—As the order of arrest in this action was granted by me, I may take the liberty of saying that it was most inadvertently granted upon an affidavit which I am satisfied was entirely insufficient, and that had the application below been to vacate the order on that ground alone, it should, and would, have prevailed. But as the defendant did not rely exclusively on the plaintiff's papers, but moved on the merits, it will not be necessary to review and point out the defects of the original affidavits, especially since if that affidavit be assumed to be sufficient, the order below was right on the whole case as disclosed by both sides.

The application for arrest was made under subd. 3 of section 179 of the Code. In such cases, the right to arrest does not spring from the cause of action, and consequently the rule that where the cause of action furnishes the ground of arrest, the order will not be vacated upon a denial of the alleged cause of action, because that would be to try the case on affidavits, has no application.

This action, which, when suits had names, would have been called an action of replevin, was brought to recover the possession of personal property.

In such actions, the defendant cannot be held to bail, as a matter of course, but if it appear that he has concealed, removed or disposed of the property or any part thereof, so that it cannot be found or taken by the sheriff, and with intent that it shall not be so found or taken, or with the intent to deprive the plaintiff thereof, he may be arrested.

The right to arrest, therefore, depends not upon the character of this action, but upon the question whether the defendant has

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concealed, removed or disposed of the property so that it cannot be found or taken by the sheriff, and with the intent that it shall not be so found or taken, or with the intent to defraud the plaintiff of the benefit thereof. This is not matter which could be averred in the complaint, and traversed by the answer, and, therefore, is not within the reason of the rule which refuses to try the merits of an action on affidavits.

This is really the only question which is worthy of remark, for no one can read the papers on this appeal without concluding that the preponderance of evidence is decidedly in favor of the defendant. But even if this were not so apparent, as the papers are conflicting, I think the proper rule is to hold that the decision below must be regarded as conclusive on the facts.

I think the order below is clearly right, and should be affirmed, with costs.

DELANEY *against* BRETT.

New York Superior Court; General Term, 1866.

ATTACHMENT AGAINST VESSELS.—SUPERIOR COURT OF NEW YORK.—RECITALS OF BOND.

The justices of the Superior Court of the city of New York have power to issue attachments against vessels, under the act of 1862.

On an application for an attachment under that act, a specification of the debt need not be filed, unless the vessel has left the port where the debt was contracted.

A bond given to discharge the vessel from such an attachment is not void by reason of irregularities in the issuing of the attachment. (Per ROBERTSON, Ch. J.)

It will be presumed that the requisite undertaking was given by the creditor on issuing the attachment, especially where the warrant recites that this was done.

This action was brought by William H. Delaney against James E. and Gustavus A. Brett, upon a bond, given to discharge an attachment against the brig *Laura Russ*, issued under the

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act of 1862 (*Laws of 1862*, 957). The attachment was granted by Hon. A. L. ROBERTSON, Chief Justice of the New York Superior Court, on application of the plaintiff, on the 28th of September, 1864. The application did not set forth that any specification of the lien or claim had been filed. The defendants gave the bond in suit to procure the vessel's discharge. The action was tried on the 23rd of May, 1865, before Hon. Justice MONELL and a jury, and a verdict rendered in favor of plaintiff for one hundred and two dollars and eighty-six cents. When plaintiff rested his case, a motion was made for a dismissal of the complaint; which motion was denied, and defendants' counsel excepted.

Beebe, Dean & Donohue, for the defendants.—I. The complaint should have been dismissed, because, 1. It did not appear that the specification required by the statute had been filed before the application for the attachment. 2. The application did not state where the specification was filed. 3. There was no evidence that any undertaking was given by the plaintiff.

II. The justice granting the attachment had no power to grant the same.

A justice of the Superior Court has no power by law to act as justice of the Supreme Court, at chambers in term time. If it should be held that he has, then he has at all times a right to act as such in granting orders of arrest, injunctions, extensions of time, attachments, and any other order or provisional remedy in suits pending in the Supreme Court. It should at least appear affirmatively that the application was made and granted when there was no term of the Supreme Court.

III. It did not appear that the vessel was within the county of New York at the time of the application (§ 4). The application stated "that said vessel has not departed from said *port* of New York since said debt was contracted." The *port* of New York includes more than the *county* of New York, it includes Kings, Queens, Richmond and Westchester counties, and Jersey City in the State of New Jersey, and the vessel might have been in any one of those places at the time of the application—it was necessary to state the county to give jurisdiction to the officer granting the warrant.

Emerson, Goodrich & Knowlton, for the plaintiffs.

BARBOUR, J.—The objection of the appellants that the attachment against the vessel in this case was not allowed by an officer authorized by law to perform the duties of a justice of the Supreme Court at chambers is untenable. The statute expressly declares that the chief justice and each of the associate justices of the Superior Court shall be and are authorized to perform all the duties which the justices of the Supreme Court out of term are authorized to do and perform by any statute of this State. (3 *Rev. Stat.*, 5th ed., 359; § 17).

It was not necessary that the application for the attachment should state in what place the specification was filed. For the act does not require the filing of a specification unless the ship should have left the port where the debt was contracted before such application is made; and in this case she still remained there.

If the specific objection to the attachment, because of the failure of the plaintiff to prove that an undertaking has been given, had been stated to the court upon the motion of the defendant to dismiss the complaint, it is quite probable that the defect in the proof in that regard might have been supplied, if the plaintiff had deemed it necessary. As the question was not raised or passed upon at the trial, there is no decision upon the point which we have power to review.

Independent of that, however, we are bound to assume, in the absence of evidence to the contrary, that the justice who issued the warrant of attachment performed his duty by receiving from the plaintiff the undertaking which is required by the seventh section of the act, previous to issuing such attachment.

The judgment must be affirmed with costs.

ROBERTSON, Ch. J.—This was an action upon a bond executed by the defendants in a certain penal sum (\$206), conditioned to pay the amount of all claims and demands, due the plaintiff, established to be subsisting liens on a certain vessel (The *Laura Ross*), under an act to provide for the collection of demands against ships and vessels, passed in April 1862 (*N. Y. Session Laws*, 1862, 987). The bond recited the issuing of a warrant of attachment against such vessel, but not that such bond was given to procure its discharge; nor is there any evidence that it was given for such purpose.

The only objections on the trial were to the regularity of the issuing of the attachment.

However irregular the attachment may have been, the bond was not void (*Ring v. Gibbs*, 26 *Wend.*, 502; *Franklin v. Pendleton*, 3 *Sandf.*, 572; S. C. on appeal, 7 *N. Y.* [3 *Seld.*], 508). The only questions on the trial were as to the nature and amount of the plaintiff's claim, and whether it was a subsisting lien (same cases).

The execution of the bond was a waiver of irregularities.

The justices of this court have authority to issue such warrants (*Renard v. Hargous*, 13 *N. Y.* [3 *Kern.*], 259).

There was no necessity of filing a specification of the lien, unless the vessel left the port (*Laws of 1862*, 957; § 2), as there was no proof that she had done so.

The warrant recites that an undertaking was given; the defendants did not prove the contrary, and every intendment must be made against them.

I concur in affirming the judgment, with costs.

STRYKER *against* STORM.

Supreme Court, Third District; Special Term, March, 1866.

JUDICIAL SALE.—SETTING ASIDE ON MOTION.

The court will not set aside a judicial sale on the ground that the guardian of infants who are interested failed to attend the sale, unless it be shown that in consequence of such non-attendance the property sold at a less price than it would have brought if the guardian had attended.

Where the sale was well attended and fairly conducted, it should not be set aside, even at the instance of infants unless it is made to appear that, upon a resale, their share of the proceeds, after indemnifying the purchaser at the first sale, will be materially increased.

Motion on the part of the plaintiff to confirm a sale in partition. Also, on the part of certain of the defendants to open such sale.

Stryker v. Storm.

The action was brought by Samuel G. Stryker against Harman V. Storm and others.

The facts involved in the present motions are stated in the opinion of the court.

Martin J. Townshend, and *J. Brown*, for plaintiff.

E. F. Bullard, for defendant.

INGALLS, J.—It is not pretended that the sale was irregular, or that there has been any improper conduct on the part of the referee, or any of the parties who attended the sale. Carroll purchased the farm at the price of eight thousand one hundred dollars, after the parties who were interested, and who attended the sale, had consulted, and deliberately determined not to bid beyond such sum. The motion to open the sale is made upon the ground that the general and special guardians of Baront and Theodore Storm, who are infants, and owners of an undivided half of the premises sold, failed to attend the sale.

It appears from the papers that the said guardians started from Jonesville on the morning of the day the sale occurred, and went to Waterford to take the cars, which were there due at nine o'clock and thirty-five minutes, A. M., for the city of Albany, to attend the sale, which was advertised for twelve o'clock, noon. That such train was delayed so that it did not arrive at Waterford until nearly one o'clock, P. M. No other mode of conveyance was sought, although the distance from Waterford to Albany was only nine or ten miles. The guardians, with their counsel, reached Albany after the sale. It does not appear by the papers that a greater sum would have been bid for the farm if such guardians had been present at the sale. The affidavit of Chauncey Broughton is produced, in which he states that such farm contains one hundred and ten acres, and is worth, in his opinion, ninety dollars per acre. Also the affidavit of George A. Godfrey, who therein states that in his judgment it is worth one hundred dollars per acre. Mr. Bullard, the counsel for the guardians, in his affidavit, states that the general guardians of the infants will bid on a resale eight thousand five hundred dollars for the farm. Mr. Bullard, upon the argument of the motion, submitted, on his own behalf, a written proposition offering to bid on a resale nine thousand dollars, which proposition was

objected to by the counsel for the plaintiff, on the ground that no such offer accompanied the motion papers.

In opposition to the foregoing, the plaintiff produced the affidavit of William Van Dermark, in which he states that the value of the farm does not exceed seven thousand dollars; also, the affidavit of Morris Mann, who states that the value of the farm does not exceed eight thousand dollars.

It appears that Carroll has borrowed four thousand and ten dollars for the purpose of performing the contract of sale on his part, and has subjected himself to an expense of not less than one hundred dollars in procuring counsel to protect what he deems his rights, and has been subjected to loss of time, and some other expenses in the matter. There was a full attendance at such sale, and all the parties interested, except the said infants, either attended in person, or were represented. The children of the defendant Harman V. Storm, who are also infants, are interested in the premises, and their said father bid at the sale eight thousand dollars, and then allowed the farm to be struck off to Carroll at the said sum of eight thousand one hundred dollars. All the parties interested are satisfied with the sale, except the guardians of the children of Theodore Storm.

Mere inadequacy of price will not authorize a resale, unless it is so gross as to justify an inference of fraud, surprise, or improper conduct on the part of the person moving such sale (*Gould v. Gager*, 18 *Abb. Pr.*, 32; *S. C.*, 24 *How. Pr.*, 440; *Whitbeck v. Rowe*, 25 *How. Pr.*, 403). In the last case, Justice HOGEBROOM remarks: "We have no rule of equity which permits us to set aside a sale in the absence of fraud, misconduct, surprise, or mere grounded misapprehension, simply because a higher price can be reasonably anticipated on a resale of the premises, however just in theory such a rule might appear to be if the advance in price were marked and decided."

It is apparent from the facts in this case, that the sale can not be set aside upon such grounds. The resale must be ordered, if at all, on the ground that the guardians failed to attend such sale, under the circumstances detailed in the affidavit of Mr. Bullard; and in order to interfere, the court should be satisfied that in consequence of such non-attendance the property sold for a price less than it would have brought, if said guardians had attended the sale. It does not appear by the papers that either of the parties would have bid one dollar beyond the eight thousand

one hundred dollars, if they had reached Albany before the sale was concluded. I deem this an important consideration, as it would be a dangerous rule to establish—that a judicial sale could be set aside merely because it was discovered, after the sale had occurred, that some person who did not attend the sale estimated the value of the property at a price exceeding the sum at which the same was regularly and fairly sold.

In regard to the actual value of the farm, there is a direct conflict in the estimates contained in the affidavits; and the result of the sale, which is conceded to have been well attended and fairly conducted, favors the valuation contained in the affidavits read in opposition to the motion for a resale of the premises.

Assuming that the guardians will, upon a resale, bid eight thousand five hundred dollars, I am of opinion that the interests of the infants would not be promoted by such resale. Only four hundred dollars would be added to the price, of which the said infants would be entitled to one half, subject to an allowance to Carroll of such a sum as would be just for the expenses he has incurred, and the costs of resale. It would be unjust towards Carroll to deprive him of the benefit of a purchase fairly made and fully performed on his part, without a reasonable compensation, which should at least cover the expense which he has incurred (*American Life Ins. Co. v. Oakley*, 9 *Paige*, 259; *Lentz v. Craig*, 2 *Abb. Pr.*, 294; S. C., 13 *How. Pr.*, 72; *Murdock v. Empie*, 9 *Abb. Pr.*, 283; S. C., 19 *How. Pr.*, 79).

If it be further assumed that Mr. Bullard should bid nine thousand dollars, agreeably to the offer which he submitted in the manner aforesaid, I am still inclined to think the advance would not justify a resale, as the infants would be but slightly benefitted after deducting the amount which Carroll should receive, and the expenses of a resale. Again, there are other parties interested who are satisfied with the sale, and desire its confirmation, and their rights are to be regarded.

It is true, that the court should be vigilant in protecting the rights and interests of infants, and not allow even the negligence or unfaithfulness of their guardians to prejudice their rights (*Lefevre v. Laraway*, 22 *Barb.*, 168; *Freeman v. Munns*, 15 *Abb. Pr.*, 468). But this principle is not to be carried to such an unreasonable extent as to entirely disregard the rights of other parties.

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After a careful consideration of the facts submitted, I am of opinion that the sale should be confirmed, believing that the interests of all the parties will be promoted thereby. A judicial sale should not be set aside unless a very clear case therefor is presented. Any other course will impair confidence in such sales, and have a tendency to deter persons from attending and purchasing thereat.

The motion to confirm the sale must be granted, and the motion to set aside such sale denied.

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Shin 81, 83.

WRIGHT *against* RITTERMAN.

New York Superior Court; General Term, June, 1866.

ARRESTS.—FORMS OF ACTION.—INSOLVENT'S DISCHARGE.—
FORMER ADJUDICATION.

Where the plaintiff in an action on contract obtains an order of arrest, on which the defendant is taken, the subsequent exoneration of the defendant from imprisonment for debt, under the provisions of 2 Rev. Stat., 30, § 10, precludes the plaintiff from procuring a second arrest in an action sounding in tort but founded on the same transaction as the alleged cause of action on contract.

Thus a fraudulent purchaser of goods, who has been sued on the contract of sale, and arrested in the action on the ground of fraud in contracting the debt, cannot, after he has been exonerated for imprisonment for debt, be arrested in a suit for damages for conversion of the goods.

Where a defendant has been discharged from imprisonment under an order of arrest by due process of law, he is not liable to be arrested and imprisoned a second time for the same cause, though in a different form of action.*

Appeal from an order vacating an order of arrest.

The action was brought by William W. Wright and others, against Israel Ritterman.

The facts are fully stated in the opinion of the court.

* To similar effect is *People v. Kelly*, *post*, 432.

C. Bainbridge Smith, for the plaintiffs, appellants.

Elbridge T. Gerry, and *B. F. Sawyer*, for the defendant, respondent.

BY THE COURT.*—GARVIN, J.—The defendant, on the 26th of September, 1865, falsely and fraudulently represented to the plaintiffs, with intent to cheat and defraud them, that he was worth the sum of ten thousand dollars, and on the faith of that representation, they sold him and he obtained from them a bill of goods, amounting to nearly four thousand dollars. The plaintiffs, on the 14th of September, 1865, commenced an action in the Supreme Court, for goods sold and delivered, and obtained an order for the arrest of the defendant, whereon he was to be held to bail in the sum of four thousand dollars. Upon this order he was arrested and imprisoned. The defendant made and served his answer on the 14th of December, 1865, containing a general denial of the plaintiffs' complaint.

The action in the Supreme Court is still pending. Being imprisoned and confined under and by virtue of the aforesaid order of arrest, the defendant applied to his Honor the City Judge, by petition, for exoneration of his person from imprisonment, and on the 14th of February, 1866, he was released and discharged, under the provisions of article V., title I., part II., ch. 5 of the Revised Statutes.

After his release and discharge, and on the same day, an action was commenced in this court for fraudulently converting the plaintiffs' goods, wherein an order of arrest was issued and the defendant thereupon arrested and re-imprisoned; it being for the same transaction for which an action upon contract was brought in the Supreme Court, the action in this court being for a *tort*.

A motion was made to vacate the order of arrest before a justice of this court, and granted upon the ground that pending an action upon contract for goods sold and delivered, no action can be maintained for the conversion of the same goods. The plaintiffs appealed.

It is contended on the part of the respondents, that the pendency of the suit in the Supreme Court establishes that

* Present ROBERTSON, Ch. J., and MONELL and GARVIN, JJ.

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even if the debt was fraudulently contracted, the plaintiffs, by bringing that suit in the Supreme Court, have affirmed the contract, and should be held to abide by that, as an election of their remedy, and not be allowed to bring an action for the conversion of the goods.

If the first action had proceeded to judgment, there can be no doubt that the plaintiffs' cause of action would have been gone forever, both upon contract and in tort; but until judgment it is quite clear that if the defendant pleaded the pendency of the former suit for the same cause of action, the plaintiffs could reply a discontinuance of such former suit, which would be a good replication (*Averill v. Patterson*, 10 *N. Y.* [6 *Seld.*], 501, 502). Until judgment, the plea is to the form of the remedy, in abatement of the action, but after judgment it is in bar to the right of recovery (*Nichols v. Mason*, 21 *Wend.*, 339).

In either of these forms of action the defendant could be arrested at the commencement of the suit, and if judgment was recovered against him, imprisoned upon the execution.

Thus, as a matter of interest to the defendant, it could make no difference which form of action was pursued by the plaintiffs in the first instance. Upon the facts disclosed in this case the plaintiffs had two remedies. An adjudication upon either, either for or against the plaintiffs, would have been a bar to the other; but until such adjudication, I see no reason, on principle or authority, which would preclude a discontinuance of the first action and a resort to the second (*Bank of Beloit v. Beale*, 7 *Bosw.*, 611).

It is, however, quite another question, whether if a party hold the defendant to bail, by order in an action upon contract, upon which he is arrested, imprisoned, and is exonerated by due course of law from such imprisonment, he can pursue the same course of arrest and imprisonment in the second suit; especially where the statute declares, that the person of such insolvent shall forever thereafter be exempted from imprisonment, for any debt due at the time of making such assignment, or contracted for before that time (2 *Rev. Stat.* 30, § 10).

This claim was a debt, so treated by the plaintiffs in the first action (though as it is alleged, fraudulently contracted), therefore falling directly within the provisions of article V., ch. 5, of 2 *Rev. Stat.*, 30, § 10.

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This is a proceeding for the benefit of an insolvent debtor—not an insolvent imprisoned on execution in civil causes, but the case of an insolvent debtor imprisoned in a suit or proceeding, founded upon a contract or liability due at the time of his assignment (2 *Rev. Stat.*, 31, § 11).

The plaintiffs say this was a debt; bring their suit upon the contract for goods sold and delivered; obtain an order of arrest upon the ground that the debt was fraudulently contracted, and instead of going for a conversion of the goods, insist upon a recovery upon the contract.

We think the defendant was properly discharged from imprisonment under the order of arrest, by the city judge, and that the case falls directly within the statute. But if the discharge is void, then the order of arrest in this court clearly should have been vacated, for the reason that the first order remained in full force, and a defendant should not be imprisoned, or held under two orders of arrest at the same time, and founded upon the same transaction or cause of action. Both these actions are for the same cause, though the forms of action are different.

Assuming the discharge to be valid, can the defendant be arrested the second time for the same cause of action?

The general rule is that a man should not be arrested a second time for the same cause of action (*Wells v. Guernsey*, 8 *Barn. & C.*, 769), although the second arrest be in a different form of action, provided it be on the same cause (3 *East*, 309; 8 *Taunt.*, 24; 3 *D. & E.*, 189).

It is true it has been held, that if the plaintiff's attorney has misconceived his form of action, he may discontinue, and hold the defendant in another action, for the same cause (*Low v. Little*, 17 *Johns.*, 347); provided the discontinuance did not arise from any laches on the part of the plaintiff, and the second arrest does not appear to be vexatious. But that is not this case. It is a legal maxim that "No man shall be twice arrested for the same cause." This applies to the same jurisdiction, and is conceded to be the general rule.

We think it a safe rule, and one that is reasonable and easy of application, that where a defendant has been discharged from imprisonment under an order of arrest, by due course of law, he should not be re-arrested, and imprisoned a second time for the same cause, though in a different form of action. The order made at special term should be affirmed, with costs.

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THE PEOPLE *on rel.* RITTERMAN *against* KELLY.

Before Hon. A. D. Russel, City Judge of the City of New York; August, 1866.

HABEAS CORPUS.—ARREST.—DISCHARGE FROM IMPRISONMENT.—
FORMER ADJUDICATION.

After a defendant, arrested in a civil action, has been discharged from imprisonment under the statutes relative to insolvents, the plaintiffs cannot, by merely changing the form of action to a suit for tort instead of a suit on contract, procure the arrest of the defendant in another court for the same cause for the purpose of evading the force and effect of his discharge, and thereby defeating the clear intendment of the statute.

Where the gist of the transaction is a tort, if it arises out of a contract, the plaintiff may declare in tort or contract, at his election; but, having made his election, is bound by it.

It is a legal maxim that no man shall be twice arrested for the same cause.

When a defendant has been discharged from imprisonment under an order of arrest, by due course of law, he should not be re-arrested and imprisoned a second time, for the same cause, though in a different form of action.

Where the return to a *habeas corpus* shows a detainer under legal process, the only proper points for examination are the existence, validity, and present legal force of the process; except where, in commitments for criminal matters, the court or officer hearing the *habeas corpus* is invested with a revisory or corrective jurisdiction over the court or officer commanding the imprisonment, and with a jurisdiction also over the offence, or subject matter of the commitment; in which case the facts constituting the grounds of the commitment may be reviewed.

The *habeas corpus* cannot have the force and operation of a writ of error, or a *certiorari*; nor is it designed as a substitute for either. It does not, like them, deal with errors or irregularities, which render a proceeding voidable only; but with those radical defects which render it absolutely void.

Illegality signifies that which is contrary to the principles of law, and denotes a "complete defect in the proceedings."

Hence, where a defendant has been arrested a second time, after a discharge and exoneration from imprisonment for the same cause in another action, he may be discharged on *habeas corpus*, notwithstanding relief might be had on motion in the court from which the process was issued.

Relief on *habeas corpus* is not to be refused in a proper case upon the ground

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that upon a prior writ, issued by another judge, relief has been refused, if it appears upon the second application that essentially different facts are involved from those which were presented on the first application.

Habeas corpus.

The writ was sued out on the relation of Israel Ritterman, imprisoned at the suit of creditors, against John Kelly, sheriff of the city and county of New York.

The facts of the case are stated in the opinion.

Elbridge T. Gerry, for the relator.

Levi S. Chatfield, and *Titus B. Eldridge*, for the creditors, opposed.

RUSSEL, CITY J.—A writ of *habeas corpus* was allowed by the City Judge, directed to the sheriff of the city and county of New York, commanding him to have the body of Israel Ritterman, by him imprisoned and detained, as is said, together with the time and cause of such imprisonment and detention, before the said City Judge, on the second day of July, one thousand eight hundred and sixty-six, at three o'clock, to do and receive what shall then and there be considered. To which writ, the said sheriff, on the return day, made return that he held the relator under and by virtue of several orders of arrest, naming some thirteen different suits instituted against him, on which orders of arrest were allowed. The said City Judge, on the return of said sheriff, directed that a notice of eight days be given to the attornies for the plaintiff in each of said actions, that a *habeas corpus* had been issued, and that the hearing on the return of said writ would take place before said City Judge, at his chambers, No. 82 Nassau street, on the 11th day of July inst., at three o'clock P. M. of that day, at which time the attornies for the respective creditors appeared. And the attorney for the said relator filed his traverse to the return of said sheriff, and denied that he was held by the said sheriff by virtue of any writ, and that he was and is legally imprisoned and detained by said sheriff; but alleged:

“That prior to the fourteenth day of February, one thousand eight hundred and sixty-six, he was arrested by said sheriff by color of certain orders of arrest issued against him by the courts

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in the said return mentioned, in certain actions therein brought, the titles of which and the times of which arrests are set forth in said return. That each and all of said actions were brought to recover amounts claimed to be due the respective plaintiffs for the non-payment of certain debts arising upon contract in the purchase by him of certain goods, and each and all of said orders of arrest were granted on the ground of alleged fraud in his obtaining such goods and in contracting such debts. That whilst said action was pending, said Ritterman made application to the City Judge for his discharge under the non-imprisonment act, and such proceedings were thereupon had before said City Judge, that on the fourteenth day of February one thousand eight hundred and sixty-six, he granted to said insolvent Ritterman a discharge, declaring 'that the person of the said insolvent should forever thereafter be exempted from arrest or imprisonment by reason of any debts due or other liabilities existing at the time of his making said assignment, or contracted for before that time, though payable afterwards, and by reason of any liabilities incurred by said insolvent by making or endorsing any promissory note or bill of exchange, or incurred by said insolvent in consequence of payment by any party to such note or bill of the whole or any part of the money secured thereby, whether said payment be made prior or subsequent to the execution of said assignment, and if now imprisoned, that he be forthwith discharged and released from the same.' That on the day aforesaid, an authenticated copy of said discharge was served on said sheriff, and he was required to release and discharge the said Ritterman from said custody and imprisonment, but declined and refused so to do. That on the 28th day of February, one thousand eight hundred and sixty-six, the attorney for one Myers procured another order of arrest against said Ritterman (which is the supposed writ referred to as of that date in said return), whilst the first order of arrest was still pending and unrevoked, and before any discontinuance. That such second order of arrest was granted in a second action by the same plaintiffs against the said Ritterman, in which, in order to evade the legal effect of said discharge, they based their alleged right to recover upon the ground of alleged tortious conversion of the property sold, instead of upon that of non-performance of contract to pay for such property, which was the ground of claim or demand set forth in their first suit. That other creditors pursued the same course,

and the tortious conversion of said property was alleged to have accrued prior to the said 14th day of February, one thousand eight hundred and sixty-six."

The attorneys for the respective creditors in the several suits referred to, joined issue on said traverse; and the attorney for the relator proved all the allegations contained in said traverse.

The attorneys for the plaintiffs in the several suits referred to then proved before said City Judge, that a writ of *habeas corpus* was allowed by Justice BARNARD and heard before Mr. Justice CLERKE; and he directed—"That the prisoner be remanded, and the writ discharged." And also, that another writ of *habeas corpus* was allowed by Justice MONELL, for the reason that the matter had not been decided by Mr. Justice CLERKE, who, after the allowance, rendered his decision, whereupon Justice MONELL remanded the prisoner and discharged the writ. And it was also proven, that the actions and orders of arrest, on which the relator was held by said sheriff, at the time of his discharge, were discontinued, and subsequently actions of tort (for the same cause), were commenced against him, in which he is now imprisoned by several orders of arrest. But it did not appear before me, whether either of the applications were heard on the merits, or on what ground the prisoner was remanded and the writ discharged. The pleadings in the several suits were before me, and submitted, together with various opinions rendered by different judges in the Supreme and Superior Courts of this city, on motions to reduce the bail, or discharge the said relator from arrest in said suits, in consequence of said discharge by the City Judge.

There can be no doubt that the discharge granted by the City Judge to the relator, under the act exonerating his person from imprisonment, released and discharged him, from all the orders of arrest, under which he was then held by said sheriff; the act declaring:—"That the person of the said insolvent shall forever thereafter be exempted from arrest and imprisonment, by reason of any debts due, or other liabilities existing at the time of his making said assignment, or contracted for before that time, though payable after, &c., &c.; and if then imprisoned, that he be forthwith discharged and released from the same." The plaintiffs in the different actions, prior to the relator's discharge, having made their election of actions, by proceeding on contract, though founded in fraud, and he being, by the said dis-

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charge, released from imprisonment on the same, cannot, by changing the form of action (provided it be for the same cause), re-arrest the said relator. It has been held that, "an insolvent discharge operates as well upon debts arising *ex delicto* as upon those *ex contractu*." (Luther *v.* Deyo, 19 *Wend.*, 629; Deyo *v.* Van Valkenburgh, 5 *Hill.*, 242.) The non-imprisonment act contemplated no such artificial distinction between the actions of contract and tort. Whatever the law would compel the insolvent to pay, whether certain or not, was covered by and included in his discharge (3 *Rev. Stat.* [5 *ed.*], 104; § 10; Andreas *v.* Murray, 2 *Abb. Pr.*, 8, 14; Newell *v.* The People, 7 *N. Y.* [3 *Seld.*], 9). If, therefore, the liability existed prior to judgment, in an unliquidated form as to amount, it is covered by the express language of the statute, which, in exonerating the insolvent from imprisonment, draws no distinction as to time, whether before or after judgment (2 *Rev. Stat.* [5th *ed.*], 104; § 10). If then the defendant was released, by virtue of his discharge from imprisonment in the first actions, it was clearly wrong and illegal for the plaintiffs to change merely the form of action, and in another court obtain orders of arrest, for the purpose of evading the force and effect of his discharge, and thereby defeating the clear intendment of the statute enacted for the relief of the unfortunate debtor. Where the gist of the transaction is a tort, if it arises out of a contract, the plaintiff may declare in tort or contract, at his election; and, having made his election, is bound by it (Stoyell *v.* Wescott, 2 *Day*, 422, 531; Vaise *v.* Smith, 6 *Cranch S. Ct.*, 226).

Another question presents itself under this branch of the case—whether after a party has been once arrested and held to bail, he can for the same cause of action be a second time arrested. This question was before the general term of the Superior Court, in the case of Wright *v.* Ritterman, on an appeal from the special term, and at the last June term of said court it was decided in favor of the relator herein*—Justice GARVIN, in a very able opinion, using this language—"It is a legal maxim, that no man shall be twice arrested for the same cause. This applies to the same jurisdiction, and is conceded to be the general rule. We think it a safe rule, and one that is reasonable and easy of application, that when a defendant has been discharged

* The decision is reported, *ante*, 428.

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“from imprisonment under an order of arrest, by due course of law, he could not be re-arrested and imprisoned a second time, for the same cause, though in a different form of action.”

It has been urged by the counsel for the creditors with great force, “That whenever it appears by the return to a *habeas corpus* that the petitioner is held under the process of a court, having jurisdiction of the person and of the subject matter, he will not be discharged; and especially not, by any court, other than that from which the process issued.”

This proposition to a certain extent is true; but I understand the rule of law to be this: Where the return to a *habeas corpus* shows a detainer under legal process, the only proper points for examination are, the existence, validity and present legal force of the process; except where in commitments for criminal matters, the court or officer hearing the *habeas corpus*, is invested with a revisory or corrective jurisdiction over the court or officer commanding the imprisonment, and with a jurisdiction also over the offence or subject matter of the commitment; in which case the facts constituting the grounds of the commitment may be reviewed.

The *habeas corpus* cannot have the force, and operation of a writ of error, or a *certiorari*; nor is it designed as a substitute for either. It does not like them, deal with errors or irregularities, which render a proceeding voidable only; but with those radical defects, which render it absolutely void. A proceeding defective for irregularity, and one void for illegality, may be reversed upon error or *certiorari*; but it is the latter defect only, which gives authority to discharge on *habeas corpus*. Illegality signifies that which is contrary to the principles of law, and denotes a “complete defect in the proceedings.” It is a rule essential to the efficient administration of justice, that where a court is invested with jurisdiction over the subject matter upon which it assumes to act, and regularly obtains jurisdiction of the person, it becomes its right and duty to determine every question which may arise in the cause, without interference from any other tribunal. When the *habeas corpus* interferes with another competent and acting jurisdiction, it will be denied, as an inappropriate remedy; for it was never designed to be used to frustrate or interrupt the due course of justice, nor to intermeddle with other judicial proceedings, while a ready redress may be had, by application to the tribu-

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nal whose action may be the subject of complaint. Instances have occurred where relief has been granted on irregular commitments, or civil process, by *habeas corpus*, notwithstanding it might have been obtained on motion to the court from which it issued (*Ex parte Beatty*, 12 *Wend.*, 229; *James v. Kelly*, 17 *Mass.*, 116; *Bank of U. S. v. Jenkins*, 18 *Johns.*, 305; 3 *McLean*, 226). But in all these cases the power to interfere was exercised or arrested by a court, not only superior to the court or officer under whose process the imprisonment was claimed, but having by its constitution appellate jurisdiction over such court or officer.

The second orders of arrest being absolutely void, the present application is a proper one for his discharge, and is in accordance with the decisions on that subject (*Matter of Baker*, 11 *How. Pr.*, 418; *Gray's Case*, 11 *Abb. Pr.*, 56; 3 *Hill*, 662, *Appendix*; *Hurd on Hab. Corp.*, 334).

This case having been brought before Justice CLERKE, on *habeas corpus*, and he having "remanded the prisoner and discharged the writ," can another *habeas corpus* issue, and would the determination of Justice CLERKE be *res adjudicata*? An estoppel cannot be raised by proof that two issues, which are on their face different, contain a fact common to both, which, having been ascertained in one, should not be controverted in the other (*Murry v. Harris*, 2 *Johns.*, 24; *Rogers v. Alevater*, 4 *Day*, 431; 4 *Cow.*, 476; 1 *Esp.*, 43). It did not appear what points were before Justice CLERKE, or on what grounds the writ was dismissed; but it was shown on this application that a different state of facts existed, and which could not have been passed upon at that time; consequently the plea of *res adjudicata* does not apply, this case coming directly under the decisions of the *People v. Mercein* (3 *Hill*, 399); *Sweet v. Tuttle* (14 *N. Y.* [4 *Kern.*], 465); *Bently v. Gardiner* (15 *Abb. Pr.*, 482); *Loring v. U. S. V. G. P. Co.* (30 *Barb.*, 644); *Malam v. Simpson* (12 *Abb. Pr.*, 225).

The relator is, therefore, discharged from imprisonment, on all the orders of arrest, under which he is held by the sheriff of the city and county of New York.

ARRIETA *against* MORRISSEY.*New York Common Pleas; General Term, July, 1866.*

PLEADING.—COMPLAINT FOR MONEY LOST AT PLAY.—DEFINITENESS AND CERTAINTY.—APPEALABLE ORDER.

In an action to recover back money lost at play, the complaint is obnoxious to a motion that it be made more definite and certain, unless it states the facts necessary to show clearly under which of the several sections of the statute of betting and gaming the action was brought.

Where there are several sections of a statute creating a cause of action, differing in their legal effect and in the remedies provided, and the complaint in an action under the statute is so drawn that it may include claims under more than one provision, the plaintiff may be required, on motion, to make it more definite and certain in this respect.

In an action to recover money lost at play, since the statute gives the action only for losses exceeding twenty-five dollars at one sitting, and requires it to be brought within three months after payment, the defendant is entitled to require the plaintiff to specify in his complaint the amount lost at each sitting, and the times of payment. It is not sufficient that these facts might be called forth by requiring a bill of particulars. (Per CARDOZO, J.)

An action to recover back money lost at play, is not an action for a penalty or forfeiture, within the meaning of the provision of the Revised Statutes which gives a short mode of pleading in such cases.

An appeal from an order refusing to require the complaint to be made more definite and certain, sustained, and the order reversed.

Appeal from an order made at a special term, denying a motion to make the complaint more definite and certain, under section 160 of the Code of Procedure.

The complaint contained two counts. In the first, it was alleged that during the months of August and September, 1863, the defendant, John Morrissey, kept a gambling establishment at Saratoga Springs, and that during such times the plaintiff, Pablo de Arrieta, at such establishment, made certain wagers and bets, which were made to depend upon a game of lot or

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chance, commonly called "faro," which game of lot or chance, was under the management and direction of the defendant, at such establishment. That the wagers and bets so made were lost by the plaintiff while betting on such game, and were won by the defendant, and amounted in the aggregate to nine thousand dollars, which sum was paid and delivered to the defendant, who, although requested, refused to return it to the plaintiff.

The second count, under similar allegations, asserted the losing by the plaintiff and winning by the defendant, of fourteen thousand dollars during the months of September and October, 1863, at a gambling house alleged to have been kept by the defendant in New York city.

Upon these counts and allegations the plaintiff prayed judgment for the return of the sums mentioned, according to the statute in such case made and provided, with costs.

The plaintiff moved at special term, before Judge DALY, that the complaint be made more definite and certain, so as to show the precise nature of the charges against the defendant, and particularly so as to set forth the precise days on which the plaintiff claims to have lost any money by gambling, with reference to the days of the month, and the amounts claimed to have been lost on each occasion, or for other relief.

George Owen, for the motion.—I. The complaint is indefinite and uncertain. (a.) "Faro" is a technical term. Whether wagers or bets made to depend upon it come within §§ 9 or 14 of the statute against betting and gaming (2 *Rev. Stat.* [5th ed.], 925; § 14), cannot be ascertained without a clearer statement of its operations. The terms of "gambling establishment," "game," "lost," "won," and "paid and delivered," would indicate losing at play, while the terms "wagers and bets" would indicate a loss depending upon the result of a play. It is, therefore, impossible to tell whether the cause of action is under § 9 or 14 of the statute. (b.) If the cause of action is under § 14, it does not appear whether the moneys were lost at one or more sittings (2 *Rev. Stat.* [5th ed.], 925; § 14). (c.) Nor does it specify the times when, and the amounts lost on each occasion. This is necessary for two reasons: 1st, to prevent surprise to the defendant, and, 2nd, because the cause of action is founded on the statute (*Cole v. Smith*, 4 *Johns.*, 193). (d.) It cannot be ascer

tained from the complaint what items the plaintiff will endeavor to prove on the trial. To make this apparent to the party and the court, is the object of § 160 of the Code (*Decker v. Mathews* 12 *N. Y.* [2 *Kern.*], 321). (c.) Even if this action was on a particular statute, it would not be definite, as it claims a general sum for a number of items not clearly defined as a single cause of action (*Walker v. Raskin*, 12 *How. Pr.*, 30; *Forsyth v. Edmondson*, 11 *Id.*, 408; *Clark v. Farley*, 3 *Duer*, 645).

II. The precise nature of the charge is not apparent. There can be but one meaning to the word *precise*; it requires times, places, amounts, to be distinctly pointed out, to meet the understanding of the adverse party.

III. It is submitted that no matter how clear a pleading may seem on a first reading, yet if its meaning upon reflection is doubtful, or the adverse party cannot clearly understand it, the office and intent of § 160 of the Code is to vest the court with a discretion to order it to be made more definite and certain, so it can be safely answered.

Francis H. Dykers, opposed.

The motion was denied by the judge at special term upon the argument, upon the ground that by § 158 of the Code, an order for a bill of particulars was the proper remedy, if one was not furnished on demand; and from the order entered, an appeal was now taken to the general term.

John Graham and *George Owen*, for the appellant.—I. By § 142 of the Code, the complaint *shall* contain (among other things), “a plain and concise statement of the facts constituting “a cause of action, without unnecessary repetition.”

If this section stood alone, the complaint could only contain a single cause of action. The article “a” would have that effect. By § 167, however, “the plaintiff may unite in the same complaint *several* causes of action,” but they “must be *separately* stated.” The reason of that is obvious. The defences to each cause of action may be distinct—one may be proper to be tested on a demurrer—another may be the subject of an issue, upon a denial—another may be, that the cause of action has been released, or satisfied by payment. The policy of all pleadings is,

to have the cause of action or defence spread upon the record, so that a demurrer can be interposed if it is thought advisable.

II. By the statutes of this State it is provided that "the sum or value of twenty-five dollars or upwards," lost at "any time or sitting," may be recovered within three calendar months from payment or delivery (2 *Rev. Stat.*, 662, 663, § 14). Where the right to recover builds itself upon this statute, the elements of the statutory cause of action should appear on the face of the complaint. But for the statute there could be no recovery at all, and the sum or value of twenty-five dollars and upwards must be lost or delivered at one time or sitting, to constitute a cause of action. These causes of action, where they are more than one, can be included in the same complaint, but, by § 167 of the Code, they must be stated separately, *i. e.*, there must be as many counts as there are causes of action. These principles are illustrated and sustained in *Cole v. Smith* (4 *Johns.*, 193). As will be seen by that case, the former statute on this subject prescribed the form of action for the loser, but not the informer.

III. We do not combat the doctrine that, where many items of property are the subject of a single sale, the price or aggregate amount can be alleged, as the debt, in a single count, and that a bill of particulars is the proper course, if the defendant wishes more light. That is analagous to a loser at play, recovering, under one count, the aggregate of all his losings at any time, or any one sitting. While he can make one amount of all the losings at any one time or sitting, and so allege it in his complaint, he cannot aggregate the losings of any number of independent sittings, and include it in a single count. The aggregate of all the items of property sold at one time, and the aggregate of all the monies lost at one sitting, constitute and represent a single transaction, and so, a single cause of action.

IV. The mistake at special term arose from supposing that the words at the close of § 158 of the Code, "the court may in all cases order a bill of particulars of the claim of either party to be furnished," were intended for a case like the present.

These words were not designed to abolish pleadings, but to give the court a further power over them; that is, where the pleadings are as specific as pleadings ought to be, in setting forth a claim, the court can require them to be made more specific still, by a bill of particulars.

V. A motion to make the complaint more definite and certain

was the proper remedy for the defendant, as will appear by the following authorities (*Blanchard v. Strait*, 8 *How. Pr.*, 85; *Forsyth v. Edminston*, 11 *Id.*, 408; *Waller v. Raskin*, 12 *Id.*, 30; *Clark v. Farley*, 3 *Duer*, 645; *Harsen v. Bayard*, 5 *Id.*, 656).

VI. There can be no doubt about the appealable character of the present order. The right to a proper complaint, both involves the merits of the action, and affects a substantial right within subd. 3, of § 349 of the Code. The general term of the Superior Court so assumed within the last six months, in the case of an answer (as undeniable law), in a matter presented to it from the office of the counsel for the present defendant (*Mattisons v. Smith*, 19 *Abb. Pr.*, 288).

**Francis H. Dykers*, for the respondent.—I. The order of the special term is not an appealable order.

1. The only subdivision under § 349 of the Code, under which the order could be classed, is subdivision 3, which provides that an order of a single judge may be appealed from "when it involves the merits of the action, or some part thereof, or affects a substantial right."

2. The motion having been denied by the judge at special term, on the ground that the defendant's remedy was to call for a bill of particulars under § 158, when he could have obtained all the particulars sought for on the motion, the question is a mere matter of practice, and it is well settled that orders affecting mere matters of practice are not appealable (*Burhans v. Tibbits*, 7 *How. Pr.*, 78; *St. John v. West*, 4 *Id.*, 332; *Tallman v. Hinman*, 10 *Id.*, 90). As the defendant could have obtained all he seeks by this motion, under a demand for a bill of particulars, the order denying the motion cannot be said to involve the merits, or affect a substantial right.

II. If, however, the court should be of opinion that the order is an appealable one, then the order of special term was properly made, and should be affirmed. The matters in which the complaint is sought to be made more definite and certain, are not substantive facts going to make up the cause of action.

1. Sections 8 and 9, of article 3, title 8, chapter 22, of the Revised Statutes, are as follows:

"§ 8. All wagers, bets or stakes made to depend upon any "race, or upon any gaming by lot or chance, or upon any lot, "chance, casualty, or unknown or contingent event whatever

"shall be unlawful. All contracts for or on account of any money
"or property, or thing in action so wagered, bet or staked, shall
"be void.

"§ 9. Any person who shall pay, deliver, or deposit any
"money, property or thing in action, upon the event of any
"wager or bet herein prohibited, may sue for, and recover, the
"same of the winner or person to whom the same shall be paid
"or delivered, and of the stakeholder or other person in whose
"hands shall be deposited any such wager, bet, or stake, or any
"part thereof, whether the same shall have been paid over by
"such stakeholder or not, and whether any such wager be lost
"or not."

If these sections give a right of action, the complaint in this suit, following as it does the exact language of the statute, cannot be complained of as not containing a sufficiently distinct statement of the cause of action.

2. There is no limitation in these sections as to the time within which the action must be brought, nor the amounts for which it may be brought.

3. These sections in these respects are different from § 14 of the same act, where a party must lose at least twenty-five dollars at one sitting, and must bring his action within three months from the time of the loss, or he is without relief; and it was probably a belief on the part of the defendant here that this action was brought under § 14 which made him suppose that the facts which he seeks by his motion to have inserted in the complaint formed a necessary part of the facts constituting the cause of action.

4. If therefore §§ 8 and 9 give a cause of action, and the complaint is properly framed under them—even though the facts of the case, as they shall appear on the trial, should show that the complaint should have been framed under § 14, that is no ground for interfering with the complaint now; for no other facts appear now but what are stated in the complaint.

III. The distinction between §§ 8 and 9 and § 14 is, that where a person bets on a race, or on a game which is exclusively a game of lot or chance, and at which one party performs the act constituting the game of lot or chance, or in other words plays the game, and the other party only bets, such betting is within § 8:—of this class are "faro," "roulette," "three card monte." Whereas the games contemplated by

§ 14 are games which are not games exclusively of lot or chance, but games in which the result is attained to a certain extent by skill, and at which there are several hands or sides, and at which games the party losing has a hand or plays the game, and at which games betting is rather an incident to than a necessity of the game, such as whist, all fours, euchre, &c. The first kind of games are those selected by professional gamblers—the last are those more frequently found in private society, and perhaps this may be one of the reasons why the legislature put a limit to the recovery of money lost at the latter kind of games.

IV. The uniting together several sums of money lost at different times in the same claim, where all the circumstances attending the loss of each sum are the same, is not the uniting of several causes of action. 1. The action given by the statute to recover money lost in this way is the action of debt or assumpsit (3 *Rev. Stat.*, chap. 8, title 6, art. 1, § 1, 5th ed., 783). 2. In debt or assumpsit it is always permitted to unite several sums as forming the elements of one account, and it would be bad pleading to declare on each item separately.

V. The remedy the defendant should avail himself of, is to demand a bill of particulars under § 158 of the Code, and if a sufficient bill is not furnished he may apply for a further one. 1. The matters called for can be obtained by a bill of particulars (*Code*, § 158; *McKinney v. McKinney*, 12 *How. Pr.*, 22). 2. The matter sought to be made a part of the complaint would be in effect a recital of the facts by which the claim must be established, or at least the embodiment of a bill of particulars in the complaint (*Sloman v. Schmitt*, 8 *Abb. Pr.*, 5; *Common Pleas, General Term*, BRADY, J., *St. Johns v. Beers*, 24 *How. Pr.*, 377). 3. The cases to which a motion to make more definite and certain apply are only those where some allegation of a material matter is left out, and not where the matter sought for is simply a detailed account of the plaintiff's claim (compare §§ 158 and 160).

* CARDOZO, J.—It is impossible to say positively, upon the complaint, as drawn, whether the plaintiff bases his complaint upon § 9 or § 14 of the statute against betting and gaming (2 *Rev. Stat.* 4th ed., 72).

The counsel for the respondent says in his points:—"The distinction between §§ 8 and 9 and 14 is, that where a person "bets on a race or on a game, which is exclusively a game of "lot or chance, or in other words, plays the game, and the other "party only bets, such betting is within sections 8 and 9. Of "this class are 'faro,' 'roulette,' and 'three-carded monte," "whereas the games contemplated by § 14 are not games exclusively of lot or chance, but games in which the result is attained to a certain extent by skill, and at which there are "several hands or sides." Assuming, without, however, deciding this to be a correct exposition of the statute, I think that if the plaintiff meant that the money was lost by betting on games of "faro," and that that game is purely one of a character at which but one person plays, the complaint should contain averments plainly showing that to be the state of facts, and failing to do so, may well be required to be made more definite and certain.

I am obliged to confess that I do not know that "faro" is exclusively a game of chance, or that but one person plays at it, and I see nothing in the present complaint which informs me that such is the fact. It is alleged that the "bets were made to "depend on a game of lot or chance," but that would be equally true, whether the game was exclusively a game of lot, or partook of a mixed character of chance and skill. Nor does the averment that "the game of lot or chance was under the management or direction of the defendant" convey to my mind anything more than that the pleader meant to say that the defendant was the proprietor or manager of the establishment. It is not too much to require the plaintiff, who declares himself a violator of the law, and of honor too, to make his complaint in clear and unmistakable language, and to use such distinct and accurate expressions, that the court can understand upon which section of the statute the plaintiff rests his demand; and I do not feel any disposition to relax the strict rules of pleading in favor of such a person and such a claim. No argument that the action is brought under section 9 can be drawn from the averment that the money lost was "paid and delivered" to the defendant, because those words are used in both sections 9 and 14 of the statute, and manifestly would be applicable to any complaint in which the plaintiff meant to allege that he had paid the amount of the bets he had lost.

That it cannot be clearly and certainly understood what cause of action,—that is, whether arising under § 9, or under § 14,—the plaintiff has set up in his complaint, is a sufficient reason for requiring the pleading to be made more definite and certain.

Moreover, as the pleading is to be taken most strongly against the plaintiff who, by proper averments, could have made it clear, I think enough has been said to show that the defendant might treat this complaint as being framed under § 14; and if this be so, it is clear that there is in each subdivision or count more than one cause of action. Each time or sitting at which a loss occurred formed a separate cause of action, and it is obvious that each count of this complaint refers to at least two times or sittings. The causes of action belong to the same general class, and therefore may be joined in one complaint, but they must be separately stated (*Code*, § 167).

And this is especially proper here, because if at any sitting, the loss does not amount to twenty-five dollars, there could be no action maintained for the amount lost at that sitting. So if the actions were not brought within three months after the payment there could be no recovery. It is plain, then, that the defendant might have defences to some of the causes of action which he could not plead as to the others, and as the defendant is not to be permitted to answer a bill of particulars, it seems to me that unless the complaint be drawn properly, he may be unable to avail himself of all the defences to every part of the claim to which he may be entitled. At all events it would be throwing upon the defendant the burthen of separating in his answer the supposed causes of action, and making his defences to each according to circumstances, unless,—which we cannot know,—he has to each of the claims the same defences. I do not think that that should be done. It would be to shift from the plaintiff to the defendant the burthen of making a good pleading, which, in the first instance, rests on the former.

In any view, therefore, of the complaint, I think the defendant properly moved to make it more definite and certain (*Clark v. Farley*, 3 *Duer*, 645; *Harsen v. Bayard*, 5 *Id.*, 656).

The statute cited by the plaintiff's counsel (3 *Rev. Stat.*, ch. 8. title 6, art. 1, § 11, 5th ed. 783, or see 2 *Rev. Stat.*, 722, 4th ed.) has no application. This suit is not brought either for a penalty or forfeiture, and it is necessary that the plain-

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tiff's complaint should be special (*McKeon v. Caherty*, 1 *Hall*, 300; *Moran v. Morrissey*, 18 *Abb. Pr.*, 131; *Langworthy v. Bromley*, 29 *How. Pr.*, 92).

I am for reversing the order appealed from.

DALY, J., dissented.

BRADY, J.—Assuming the complaint to be sound, and that the various expositions by Judge DALY are correct in reference to the law governing complaints in actions of this character, nevertheless the Code, § 160, applies to them. It has been held (*Betts v. Bache*, 14 *Abb. Pr.*, 279) that a complaint framed as suggested by Judge DALY is deficient in certainty; and the court, per ROBERTSON, J., says “The authors of the Code undoubtedly intended to require parties in their pleadings to show generally that they had a good cause of action; unless the adverse party complained of not being sufficiently notified of the particular transaction, the remedy for the first being by a demurrer, and the second by a motion.” I understand that case to be a clear intimation that the court would, in such an action as this, upon a general allegation of the loss of money contrary to the provisions of the statute against gaming and betting, require the plaintiff to be more definite in the statement of his claim. The remedy sought does not affect the form of the complaint, and therefore it is not perhaps necessary to consider the sufficiency of that paper as to the cause of action itself. The question is whether it should be made more definite and certain, and I think, as there are two sections of the statute differing, in their legal effect, and the remedies provided, the plaintiff should be required, when called upon, to make his complaint more definite and certain, if the cause of action as stated may include claims under both those sections. If the plaintiff is unable to comply with the order of the court, it may be modified on a proper application.

I concur, therefore, with Judge CARDOZO, that the order of the special term should be reversed.

Order reversed.

BEEKMAN'S PETITION.

Supreme Court, First District; General Term, November, 1865.

FRAUD AND LEGAL IRREGULARITY IN ASSESSMENTS.—VACATING.—POWER CONFERRED ON THREE OR MORE PERSONS.

An assessment for the expenses of a local improvement in the city of New York, will not be set aside as fraudulent or irregular, merely because made before the work has been done. In such case, an estimate of the expenses being necessary, the assessors are authorized to make it, though not specially directed to do so in the ordinance.

Where one of the assessors named in the ordinance of a municipal corporation resigns, and a successor is appointed by the officers in whom the power of appointment is vested by law, the latter must be notified to act. The remaining members of the board have not power to proceed without his presence or notice to him; and an assessment made under such circumstances is irregular.

The case of Beekman's Petition (19 *Abb. Pr.*, 245), affirmed.

Appeal from an order vacating an assessment.

The proceedings are reported in 19 *Abb. Pr.*, *O. S.*, 245. From the decision there given, the corporation appealed.

BY THE COURT.*—LEONARD, J.—This is an appeal on the part of the city, from an order vacating an assessment, on proceedings taken under the act of 1858.

The petitioner objects that the assessment has been prematurely imposed. The ordinance, authorizing the improvement, directs the work to be done at the expense of the city, for its more speedy execution. The work was not completed when the evidence was taken in the said proceeding in August, 1864; although the assessment was reported to the board of revision, &c., in January, and confirmed by that board in March, 1864.

It is indicated by the terms of the ordinance that the improvement was to be made by the city, under section 270 of the act of April 9, 1813 (*Vide Davies' Laws*, 567).

It is provided by an act passed in 1824, chap. 49, that the

* Present, INGRAHAM, LEONARD, and BARNARD, JJ.

Beekman's Petition.

authority given by section 270, of the act of 1813, shall apply to all the ordinances of the city, for work to be done, and that the assessment therefor shall be made pursuant to section 175 of the same act. Referring to section 175, it will be seen that it contains no direction that the assessment shall be made before or after the work has been performed.

If the assessment precedes the performance of the work, it is entirely clear that an estimate of the expense must be first made; but after the work has been completed, and the expense has been paid or incurred, or definitely ascertained, the estimate is superfluous (*Wetmore v. Campbell*, 2 *Sandf.*, 342).

The same case was referred to and re-affirmed by the court of Appeals in *Manice v. The Mayor of New York* (8 *N. Y.* [4 *Seld.*], 120). In the present case, all the work had been contracted for, but a portion of it only had been completed when the assessment was made. It thus appears that an estimate was necessary in order to ascertain the amount to be assessed. The assessors were sworn to make a just estimate and assessment, but the ordinance omits any direction for an estimate. The ordinance was adopted in November, 1860, and the assessors were named therein, the common council then being authorized to make the appointment. These assessors proceeded to make the estimate and assessment in October, 1863, which they reported in December following to the board of revision, &c., who are charged now with the duty of revising and confirming assessments. I think it not necessary that the duties to be performed by the assessors should be named in the ordinance. The law has prescribed the duty which they are to perform.

The assessors being appointed by the ordinance, were required to proceed and perform the duty which the law imposed upon them as such officers.

The objection that the assessment could not be made before the completion of the work, and that the assessors were not authorized to make an estimate upon which to found their assessment is not well taken.

Another objection is urged by the petitioners, arising out of subsequent proceedings, in respect to this assessment.

One of the assessors appointed by the ordinance in 1856, resigned on the 31st of December, 1863, after the assessment list had been reported to the board of revision, &c. On the 13th of January following, that board returned the list to the

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assessors for correction. The two remaining assessors appointed by the said ordinance of 1856, acted, in making the corrections, without the concurrence of a third assessor, who had been appointed in the place of the one who had resigned, by the board of commissioners of taxes, &c., by the authority of the act which created that board, passed in 1859. It appears from the evidence that the newly appointed assessor was not invited to act in making the corrections in the assessment list, because he had not been named in the ordinance.

The report of the assessors declares that they derive their appointment from the common council under the said ordinance. It has not been insisted that the two assessors who were appointed by the said ordinance, had not authority to act after the act of 1859, making it the duty of the commissioners of taxes, &c., to appoint assessors. Nor is it claimed that they derive any authority to make an estimate or assessment by virtue of any appointment from that board.

The act of 1859, creating the said board, contains a provision authorizing a majority of the board of assessors to be appointed under that act, to make estimates and assessments. But the provisions of that act are not made applicable to the assessors theretofore existing (*Laws of 1859, ch. 302, § 16*).

The board of assessors consisted of three members, two appointed by the ordinance, and one by the board of commissioners of taxes, &c., but the two former only acted. It cannot be assumed that the other was notified, but neglected to meet with the other two; because the evidence is, that it was thought best that he should not act, as he was not named in the ordinance. The statutory rule, as well as the rule of the common law, applicable before the act of 1859, required all the members to meet and consult, although a majority may decide, unless special provision is otherwise made (2 *Rev. Stat.*, 555; *Doughty v. Hope*, 3 *Den.*, 594.) That rule is the one to which the assessors in question were required to conform. They disregarded it. This was a legal irregularity, which rendered their action, after December 31, 1863, invalid. Under the act of 1859, if that rule was applicable here, it would be illegal to exclude one assessor from acting intentionally. It might be lawful for one or two to act if one neglected, or was unable to perform duty as an assessor.

The order appealed from must, therefore, be affirmed, with costs.

McVickar v. Ketchum.

served
 at N.S. 44.
 served, 12 Abb. N.S.
 44, 245. Antisited
 Part 57, 1, 572.

McVICKAR *against* KETCHUM.*New York Superior Court; General Term, November, 1865.*

WITNESS.—EXAMINATION OF PARTIES.

Under the provisions of the Code of Procedure,—which authorize the examination of parties to actions before the trial,—the testimony of a party may be taken before issue joined.

The object of allowing a party to be examined at the instance of his adversary, before trial, was not merely for convenience, but to enable a party to obtain and secure evidence in support of his cause of action or defence.

Appeal from an order.

The plaintiff obtained an order for the examination of the defendant Edward B. Ketchum, before the complaint was served. The facts are stated in our report of the cause, 19 *Abb Pr.*, O. S., 24.

From the order the defendant Edward B. Ketchum appealed.

F. N. Bangs, for the appellant.

Jere. Larocque, for the respondent.

BY THE COURT.—MONELL, J.—The chapter of the Code relative to the examination of an adverse party, as a witness, has undergone few amendments, and is now substantially the same as when originally enacted (*Laws of 1848*, 559). The only material change is in striking out the words “in respect to any matter pertinent to the issue,” in the 349th, now 395th, section.

The oral examination of parties as witnesses is a novelty introduced by the Code. Previously, discoveries, in cases of actions at law, were obtainable only by bill in chancery. In abolishing the court of chancery, and all distinctions between law and equity, it became necessary to conform the practice prevailing in courts of law and equity, to one system. Hence

the authority to examine the adverse party was intended to be in lieu of the former bill of discovery.

No question arises, in this case, as to the right of a party to take the examination of his adversary. The statute is explicit, and the right absolute.

The only question raised by the appellant is, whether the examination can be had before issue joined. The order appealed from was made before any answer had been put in, and before the time to answer had expired.

There is nothing in the letter of the statute designating when the examination may be had. The party may be examined at the trial, before the trial, conditionally, or upon commission. In respect to conditional examinations, and upon commission, they are regulated by other statutes, which are now made to include parties as well as witnesses. A conditional examination may be had immediately upon suit brought (2 *Rev. Stat.*, 409); but a commission can issue only after issue joined (*Id.*). The examination before the trial is not a "conditional" examination. The testimony taken may be read by either party on the trial, whether the party examined be present in court or otherwise.

It is difficult to discover a reason for allowing a conditional examination of a party. The authority to examine before trial is so ample, that a conditional examination can never be required.

The object of the examination is, to obtain evidence in support of the plaintiff's cause of action, or defendant's defense, and may be more important to plaintiff before issue than afterwards. In the court of chancery a bill of discovery was entertained even before suit brought, and it was not necessary to aver that issue has been joined (2 *Barb. Ch.*, 106). It was sufficient if charged that the discovery was necessary to enable the complainant to bring his suit at law. In allowing the examination to be before trial, it must have been the intention of the legislature to prevent a party from depriving his adversary of his testimony at the trial. It was not merely for the convenience of the party examining, but to procure evidence in support of the action or defense. One of these designs of the legislature might always be defeated, if the examination was postponed till after issue joined.

The cases to which we have been referred, as holding that the

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issue must be joined before the party can be examined, were decided prior to the amendment of the 349th section. In all those cases, that section, as it stood before the amendment, is referred to as controlling the view that the whole examination must be upon matter pertinent to the issue.

The reason for the amendment is not obvious. It was made as late as 1863, and several years after parties were allowed to be examined as witnesses, on their own behalf (*Laws of 1857, 744*). Since the enactment of the law last referred to, very little of the chapter in the Code, allowing adverse parties to be examined, is of any importance. A party may be examined as a witness on his own behalf, or on behalf of any other party, in all cases, and either at the trial, or conditionally, or upon commission. Hence, the whole of the present 395th section might as well be repealed.

As the statute now stands, there is not, in terms, any limit to the time when the examination may be taken, nor does there seem to be any reason for a limitation. A conditional examination of an adverse party can be had immediately on the service of the summons. The reason is, that otherwise a party might be deprived of the testimony of an important witness. There are equally cogent reasons for allowing the examination of an adverse party before issue. And besides, the evidence procured on such examination may end the litigation.

In the case before us the necessity for an immediate examination is not disputed, and the amendment of the 395th section having removed the only ground upon which the decisions in the several cases to which we have been referred were placed, we are not bound to regard them as authority.

I think the order should be affirmed. The right to examine the adverse party arises, in my opinion, immediately on the commencement of the suit, and not only after issue joined.

McCUNN, J., concurred.

Order affirmed.

See 1 Lans. 300
2 E.D.S. 90.

DIGEST

OF

ALL POINTS OF PRACTICE

EMBRACED IN

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1 ABBOTTS' PR., N. S.; 30 HOWARD'S PR.; and 31 ID., Nos. 1-5;
and in the LAWS OF 1866.

ACCOUNTING.

Where the plaintiff files his complaint, alleging a partnership, and seeking for an accounting by the defendant, if he does not establish the existence of the partnership, he will not be entitled to the accounting. The mere relation of creditor of the defendant, is not, of itself, sufficient to entitle the plaintiff to an accounting. *Ct. of Appeals*, 1865, *Salter v. Ham*, 31 N. Y., 321.

ABATEMENT.

The cause of action in a replevin suit does not abate on the death of the plaintiff; and the suit may be continued in the name of his representatives; and the sureties on his bond continue liable. *N. Y. Com. Pl.*, 1865, *Lahey v. Brady*, 1 *Daly*, 443.

ACKNOWLEDGMENT OF DEEDS.

The certificate of acknowledgment of a county judge is entitled to be read in evidence, or recorded in another county, without being authenticated by the clerk of the county of which the officer is judge; whether such judge is or is not of the degree of counsellor-at-law. *Supreme Ct.*, 1865, *The People v. Hurlbutt*, 44 *Barb.*, 126.

AFFIDAVITS.

ACTION.

1. A defendant, sued in an action to which he has a partial defence, such as part payment, is bound at his peril to appear and interpose such defense; and if he does not do so, but suffers judgment to go against him for the full amount, he cannot, after payment of the judgment, recover back the excess by a second action. Although it be unconscionable to allow the creditor to retain the excess which he has thus recovered, it is a settled rule that one cannot overhaul, in another action, what has once been adjudged by a court of competent authority, having jurisdiction of the parties and of the subject matter adjudged. The judgment is equally a bar, whether obtained by default or after a trial, as to all matters necessarily adjudged by the judgment. It concludes parties and privies as to all matters of fact necessarily determined by the judgment, so that they cannot be overhauled in another court. [Reviewing many cases.] *Supreme Ct.*, 1864, *Binch v. Wood*, 43 *Barb.*, 315.
2. Actions under provisions of Metropolitan Sanitary Act, regulated. 1 *Laws of 1866*, 142, ch. 72, § 30; 2 *Id.*, 1462, ch. 686.

ADVERSE POSSESSION.

Where different parties claim the same premises under conflicting grants from the same source, each grant being upon condition that the grantee is the true owner of adjacent lands, possession under such grant by the one who was not the true owner of the adjacent lands, cannot be deemed adverse so as to ripen into a title against the other. *N. Y. Superior Ct.*, 1863, *Towle v. Palmer*, *Ante*, 81.

ADVERTISEMENTS.

Advertisements of legal notices and statutes in the county of Hamilton, regulated. 2 *Laws of 1866*, 1474, ch. 690.

AFFIDAVITS.

1. The statute giving notaries power to certify affidavits, is not to be construed as restricted to affidavits in actions pending. *Supreme Ct., Sp. T.*, 1865, *Mosher v. Heydrich*, *Ante*, 258.
2. Proofs and examinations, &c., under Metropolitan Sanitary Act, may be taken by or before one or more members of the Board, or any other person, as the Board shall authorize; and the secretary, the sanitary and assistant superintendents, and any member of said Board shall, severally, have authority to administer oaths in such matters. 1 *Laws of 1866*, 128, ch. 72, § 14, subd. 2.
3. An affidavit, in the commencement of which the deponent is designated by name, is not void for not being subscribed by him. [3 *Johns.*, 539.] *N. Y. Superior Ct.*, 1863, *Soule v. Chase*, *Ante*, 48.
4. The party's subscription to the affidavit, added to his statement for judgment by confession, is a sufficient signing of the statement, within the

AMENDMENT.

provision of the Code requiring statements for judgment by confession to be signed. *Supreme Ct., Sp. T., 1865, Mosher v. Heydrich, Ante, 258.*

Compare *Soule v. Chase, Ante, 48* : *Barker v. Cook, 16 Abb. Pr., 83.*

5. A notary public, in certifying an affidavit, need not add the place of his residence thereto, to show that the venue was within his jurisdiction. The presumption in the case of a notary is the same as in the case of a commissioner or justice,—that he acted within his proper jurisdiction. *Supreme Ct., Sp. T., 1865, Mosher v. Heydrich, Ante, 258.*

ALIMONY.

1. As a general rule, when an action for divorce is brought against the wife, and she, in her answer, either denies her guilt, or sets up affirmative defences, such as forgiveness or recrimination, or does both, counsel fees and alimony will be allowed her, unless the court is satisfied that she is altogether in the wrong, or has no reasonable ground of defence. *N. Y. Superior Ct., Sp. T., 1866, Strong v. Strong, Ante, 358.*
2. The fact that on a trial had by a jury, on issues framed, involving a denial, forgiveness, and recrimination, the jury disagreed, is enough to show that she has reasonable ground of defence, without the positive affidavits of the wife and of witnesses, usually required on motions for such allowance. *Ib.*

AMENDMENT.

1. A complaint may be amended on the trial so as to change the claim from one for goods sold and delivered, to one for goods bargained and sold. And such an amendment may be allowed by a referee. [11 N. Y., 374; 4 Duer, 38; 1 Sandf., 719; 2 Id., 421; 6 Duer, 294, 587; 1 Bosw., 417.] *Supreme Ct., 1864, Dunnigan v. Crummey, 44 Barb., 528.*
2. Where an owner of premises sued third persons, who had entered upon them under an arrangement with plaintiff's lessees, for use and occupation, and it appeared that upon the facts the defendants were in as assignees of the term;—*Held*, that the court might allow an amendment of the complaint, and permit a recovery of rent due on the lease; though a recovery for use and occupation could not be had. *Ct. of Appeals, 1864, Bedford v. Terhune, 30 N. Y., 453.*
3. Where, in a proceeding instituted by a sub-contractor under the mechanic's lien law of 1851, it appears by the complaint, and by the facts admitted by the counsel, that no lien can be established, a motion for leave to amend the proceeding to make it an ordinary action for the recovery of money against the contractor, should be denied. [2 E. D. Smith, 594.] *N. Y. Com. Pl., 1859, Bailey v. Johnson, 1 Daly, 61.*
4. Irregularities in a judgment roll, such as want of proof of service and of no answer, which may be cured by amendment, may be regarded as having been actually made in the papers when an order for the amendment is made and filed. *So held* against a motion of the purchaser under

ANSWER.

- the judgment, to be discharged on the ground of the irregularities. *Supreme Ct.*, 1865, *Bogert v. Bogert*, 45 *Barb.*, 121.
5. The provision of the Code of Procedure of this State, allowing amendments to be made to cure the omission of a party to do any act necessary to perfect an appeal or to stay proceedings (*Code*, § 327), does not authorize affixing a United States Revenue stamp upon the notice of appeal, after motion to dismiss the appeal for want of such a stamp. *Chenango County Ct.*, 1866, *Lewis v. Randall*, *Ante*, 135.
 6. Where a referee has allowed an amendment of the complaint on the trial, an affidavit of the defendant, in support of a motion for leave to serve an amended answer, should not only show that it was the opinion of the defendant and of his counsel, that an amendment of the answer and further evidence would be necessary, but should show the facts relied upon, in addition to those which had been clearly established, and prove to the satisfaction of the referee, that he was taken by surprise, and specify with reasonable precision and certainty, the nature of the evidence which the amendment to the complaint rendered material and necessary. *Supreme Ct.*, 1864, *Dunnigan v. Crummey*, 44 *Barb.*, 528.
 7. Several individuals, composing the firm of R., F. & Co., were sued by the plaintiff by their firm name, the complaint alleging that the names of the individual members of said firm were unknown to the plaintiff. F. only appeared and answered, in the first instance, claiming the goods sued for in behalf of the firm. He also put in a supplemental answer, in which he claimed judgment in his own favor for the value of the goods, and not in favor of himself and his copartners individually. After judgment, the defendants were allowed to amend by entering an appearance *nunc pro tunc* for the other two partners, and to amend the supplemental answer, so as to make it a claim in behalf of all the members of the firm individually, with a demand for judgment in their favor;—*Held*, 1st, That there was no ground for the reversal of the judgment. 2d, That the supreme court had ample power to make the amendments which were ordered, by inserting the individual names of the other members of the firm, in the answer, and in the judgment, in accordance with the facts found on the trial. *Ct. of Appeals*, 1864, *Thompson v. Kissel*, 30 *N. Y.*, 383.

ANSWER.

1. When a joint answer of several defendants denies an allegation in the complaint which the plaintiff must prove to establish his cause of action against some of the defendants, but which he need not prove to entitle him to recover against the others, the answer raises a material issue for the defendants as to whom the plaintiff must prove such allegation. *Supreme Ct.*, 1866, *Bank of Cooperstown v. Corlies*, *Ante*, 412.
2. In an action on a promissory note, an answer setting up that it was made as an accommodation note, does not show a misappropriation of the note sufficient to constitute a defence, by merely alleging that it was expected and intended that the plaintiff should have the proceeds of the note, after it was negotiated, and that instead of the proceeds he had taken the note.

APPEAL.

The answer should show a diversion of the note injurious to the defendant. *Supreme Ct.*, 1865, *Corbitt v. Miller*, 43 *Barb.*, 305.

3. Where a defendant relies on a foreign discharge in bankruptcy, as a bar, or on his having entitled himself to a certificate in bankruptcy, by which the cause of action is abated, he must set forth not only the statute, but the certificate or discharge, and the prior proceedings which warranted the granting of it; or, if no discharge or certificate has been granted, the facts in the proceedings relied on, as an accord. *N. Y. Superior Ct.*, 1865, *Philippe v. James*, *Ante*, 311.
 4. An answer by a surety alleging that all sums and liabilities except a small amount, in reference to which the defendant had interposed a separate defence, had been liquidated, paid, and settled, by and between the plaintiff and the principal debtor;—*Held*, a sufficient allegation of payment to sustain a finding in favor of the defendant upon evidence of payment. *Supreme Ct.*, 1864, *Albany City Fire Ins. Co. v. Devendorf*, 43 *Barb.*, 444.
 5. The objection to an answer in an action for slander, that it does not make the charge specific, by negating mistake, ignorance, or that the proceeding may have been one in which to swear falsely is not perjury, is a defect in substance; and the plaintiff is not bound to move against the answer, but may interpose an objection upon the trial, to the admissibility of the testimony offered. *Supreme Ct.*, 1865, *Tilson v. Clark*, 45 *Barb.*, 178.
 6. An answer interposing the Statute of Limitations, presents a proper case for the court to require, on defendant's motion, that the plaintiff reply. *Supreme Ct.*, *Sp. T.*, 1865, *Hubbell v. Fowler*, *Ante*, 1.
- It is not generally essential that the defendant, in moving to compel such reply, should state that he does not know the ground on which the plaintiff intends to rely to defeat the bar of the statute. *Ib.*

DEFENCES: SATISFACTION OF A PART OF PLAINTIFF'S CLAIM.

APPEAL.

1. Notice of a judgment for the purpose of limiting the time which the party notified has to appeal in (*Code of Pro.*, § 332), cannot be given until the judgment is so completed to be a final determination of the rights of the parties by record evidence, and an appeal can be taken. Thus, on a trial by the court without a jury, where the judgment contains other directions than for the payment of money only, the notice cannot be given while the clerk has neither made up the judgment-roll, nor entered the judgment in the judgment book. [14 *How. Pr.*, 522; 6 *Id.*, 226; 3 *Sandf.*, 721; 16 *How. Pr.*, 402.] *Supreme Ct.*, 1865, *Sherman v. Postley*, 45 *Barb.*, 348.
2. Where the issues are tried by the court in an equitable action, but a further inquiry is necessary before judgment, the entry of the decision of the court upon the issues, with a direction for the further proceedings, is an order involving the merits, from which an appeal lies to the court at general term. It is not necessary, as in case of appeals to the Court of Appeals, to wait until final judgment. *N. Y. Common Pleas*, 1865, *Smith v. Lewis*, 1 *Daly*, 452; disapproving *Lawrence v. Farmers' Loan, &c., Co.*, 15 *How.*, 57, and earlier cases.

3. Although where a court has not jurisdiction of the subject matter, the consent of parties will not confer it: a consent that an appeal may be brought after the time has elapsed for bringing it, is not liable to that objection. The appellate court having the general power to review judgments upon appeal, such a consent does not confer it, but it is a mere waiver of the right to insist that the time has passed for bringing the appeal. *N. Y. Common Pleas*, 1866, *Jacobs v. Morange*, 1 *Daly*, 523.
4. *It seems*, that all the defendants may join in an appeal from a judgment against them on their joint answer as being frivolous, if the answer be sufficient as respects some of them. *Supreme Ct.*, 1866, *Bank of Coopers-town v. Corlies*, *Ante*, 412.
5. An order to show cause is not appealable. It does not dispose of the rights of any party. It is a mere substitute for a notice of motion shortening the time, which rests in the discretion of the court. It does not affect the merits, and is not final. *N. Y. Superior Ct.*, 1864, *Watt v. Watt*, 30 *How. Pr.*, 345.
6. That an order allowing an amendment of a pleading is not appealable unless some absolute right of the appellant has been violated. *N. Y. Com. Pl.*, 1866, *Schermerhorn v. Wood*, 30 *How. Pr.*, 316.
7. An application for leave to amend a pleading at the trial, is addressed to the favor of the court, and its decision is not the subject of review upon appeal. [1 *Hilt.*, 536.] *N. Y. Com. Pl.*, 1859, *Bailey v. Johnson*, 1 *Daly*, 61.
8. An order of the supreme court allowing, after judgment, an amendment in the proceedings in the action;—*Held*, not an appealable order. *Ct. of Appeals*, 1864, *Thompson v. Kessel*, 30 *N. Y.*, 383.
9. An appeal from an order refusing to require the complaint to be made definite and certain, sustained, and the order reversed. *Arrieta v. Morrissey*, *Ante*, 439.
10. That an order giving leave to renew a motion is discretionary; and is not reviewable upon appeal. *N. Y. Superior Ct.*, 1864, *Smith v. Spalding*, 30 *How. Pr.*, 339.
11. An order in an action on an undertaking upon arrest, allowing the defendants, on payment of costs, to surrender their principal in discharge of their liability as bail for his appearance, is appealable, even if regarded as being in the discretion of the court. Such an order was one affecting a substantial right, in effect determining the action, and preventing a judgment from which an appeal might have been taken. *Ct. of Appeals*, 1865 *Bank of Geneva v. Reynolds*, 33 *N. Y.*, 160.
12. If the action is one in which a reference may be ordered, an order of a judge at special term directing a reference, upon the ground that it required the examination of a long account, is not an order affecting the merits, or which involves a substantial right, and is not appealable. [9 *How.*, 69; 7 *Id.*, 359; 7 *Hilt.*, 173.] *N. Y. Com. Pleas*, 1865, *Hatch v. Wolf*, *Ante*, 77; *S. P.*, 1866, *Schermerhorn v. Wood*, 30 *How. Pr.*, 316.
14. A motion to dismiss the complaint at the trial of an action on a policy of insurance, upon the ground that the proofs of loss served on the defendants were not in compliance with the terms of the policy, does not authorize

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- the defendants to raise the objection, on appeal, that the person on whom the magistrate's certificate was served, was not the authorized agent of the defendants to receive it. *N. Y. Superior Ct.*, 1863, *Van Deusen v. The Charter Oak Fire and Marine Insurance Company*, *Ante*, 349.
15. The court will not allow an appellant to raise, upon the appeal, for the first time, an objection to an assumption by the court below of a doubtful fact, where he took no objection below to such assumption, but only to conclusions of law founded thereon. *N. Y. Superior Ct.*, 1862, *Pollen v. Le Roy*, 10 *Bosw.*, 40; affirmed on other points, *S. C.*, 30 *N. Y.*, 549.
 15. Objection not raised on trial, which could have been obviated, not heard at general term. *Supreme Ct.*, 1865, *People v. Hurlbut*, 44 *Barb.*, 126; *S. P.*, *People v. Third Avenue R. R. Co.*, 45 *Id.*, 63.
 16. An order granting or denying a motion to open a regular inquest cannot be reviewed on appeal by the general term. [16 *Wend.*, 369; 1 *N. Y.*, 43.] *N. Y. Com. Pleas*, 1863, *Faristo v. Corlies*, 1 *Daly*, 274.
 17. The question of care and vigilance of a bailee is one of fact for the tribunal which tried the case; and its finding will not ordinarily be disturbed on appeal. *N. Y. Com. Pleas*, 1862, *Morris v. Third Avenue R. R. Co.*, 1 *Daly*, 202.
 18. The objection that the cause of action proved is not that alleged, so that there is a failure to prove the complaint in its entire scope and meaning, if taken on a motion, at the trial before a referee, to dismiss the complaint upon the plaintiff's evidence, is available on appeal from a judgment for the plaintiff upon the referee's report in his favor, although no exceptions were taken to the report upon the ground that the cause of action as found was not that set forth in the complaint. *N. Y. Superior Ct.*, 1863, *Patterson v. Patterson*, *Ante*, 262.
 19. Although a motion for nonsuit might have been properly granted on plaintiff's resting his case, on the ground that the evidence was too slight to sustain the claim; yet, where the case was subsequently strengthened by the defendant's witnesses, the exception taken on denying that motion is not available on appeal. *N. Y. Com. Pleas*, 1861, *Ballard v. Lockwood*, 1 *Daly*, 158.
 20. On appeal from a judgment, entered on a verdict, which includes a recovery on separate causes of action, one of which is not sustained by the evidence, if the evidence relied on in its support was not admissible in support of the other cause of action, and yet was such as may have prejudiced the jury in reference thereto, the court will not allow, absolutely, the respondent to retain his judgment on deducting the erroneous part, but will allow the appellant a new trial on terms. *N. Y. Superior Ct.*, 1863, *Ayrault v. The Pacific Bank*, *Ante*, 381.
 21. Where evidence is ruled out by the court below, the appellate court will not inquire into its relevancy unless the evidence or its substance appear in the case, but will assume that the decision of the court is correct. *N. Y. Com. Pleas.*, 1861, *Berry v. Mayhew*, 1 *Daly*, 54.
 22. A verdict should not be set aside merely because the court would have come to a different conclusion from that of the jury on the force and weight of the testimony. [27 *Barb.*, 528; 29 *Id.*, 491, 504.] While the

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- court on review, may and should set aside a finding of fact if it be plainly against the weight of evidence, it certainly would not go beyond that point to interfere with decisions of fact fairly deducible from conflicting testimony. [33 Barb., 127; 36 C. Ct., 23.] So held on appeal from a county court to the supreme court. *Supreme Ct.*, 1865, *Fleming v. Smith*, 44 Barb., 554.
23. Admission of immaterial evidence no reason for reversal on appeal. *Benedict v. Ocean Ins. Co.*, 1 Daly, 9.
 24. Where an appeal from the judgment of a referee is brought before the court without any case containing the evidence given upon the trial before the referee, or any exceptions to rulings made upon the trial; but solely upon exceptions taken by the defendant to the conclusions of law drawn by the referee from the facts found by him, it is the duty of the court to put the most favorable construction upon such facts in support of the judgment. *Supreme Ct.*, 1865, *Tibbs v. Morris*, 44 Barb., 138.
 25. That appellate courts, unless limited by statutory provisions, have the power to give the judgment which the inferior tribunal should have rendered. [2 Bradf., 181.] *Supreme Ct.*, 1865, *Billing v. Billing*, 45 Barb., 86.
 26. Where the findings of the referee are imperfect, it is the duty of the party who is not satisfied with them to apply for more specific findings, and not seek to avail himself of such defects on appeal; and if he does not, the finding of facts necessary to sustain the judgment will be presumed. *Ct. of Appeals*, 1864, *Brainerd v. Dunning*, 30 N. Y., 211.
 27. Where, on an appeal by the defendant from a judgment, the facts were agreed on by the parties, and could not be varied by any evidence which might be adduced on a new trial, and a reversal was had;—*Held*, that final judgment for defendants should be given on such reversal. *N. Y. Com. Pleas*, 1861, *Peterson v. Walsh*, 1 Daly, 182.
 28. Where the review and reversal of a judgment by the ultimate appellate tribunal was had in accordance with existing practice, but was subsequently held a nullity, because the appeal was not taken in a way that entitled the court to hear it;—*Held*, that after nine years' acquiescence by the party who had recovered the original judgment, he should be restrained by a court of equity from enforcing it, unless he consented that an appeal might then be brought with the same effect as if it had been brought within the time prescribed by law. *N. Y. Com. Pleas*, 1866, *Jacobs v. Morange*, 1 Daly, 523.
 29. The provision of section 11, subd. 3, of the Code of Procedure,—giving an appeal to the court of appeals, from certain orders,—amended, by inserting a provision, giving the court jurisdiction, upon such appeal, to review any intermediate order involving the merits, and necessarily affecting the order appealed from. 2 *Laws of 1866*, 1835, ch. 824, § 1.
 30. Where no exceptions are taken upon a trial before a referee, and no conclusions of fact are stated in his report which raise any questions of law, and no conclusions of law are stated, and the supreme court has affirmed the judgment, the court of appeals has no jurisdiction to review the case. *Ct. of Appeals*, 1865, *Doty v. Carrolus*, 31 N. Y., 547.
 31. An order of the supreme court, setting aside a verdict as being against

- the weight of evidence, and on payment of costs, is not reviewable, on appeal, by the court of appeals. *Ct. of Appeals*, 1864, *Young v. Davis*, 30 N. Y., 134.
32. Where the case contains no finding of facts, an appeal to the court of appeals is not entitled to be heard. [16 N. Y., 616; 13 N. Y., 344.] *Ct. of Appeals*, 1865, *Leland v. Cameron*, 31 N. Y., 115.
33. The court of appeals will not look into the evidence to ascertain whether it sustains the findings of the court below. *Ct. of Appeals*, 1865, *Dayton v. Borst*, 31 N. Y., 435; S. P., 1864, *Thompson v. Kessel*, 30 N. Y., 383; *Frost v. Koon*, *Id.*, 423. And compare *Glass v. McAllister*, 31 N. Y., 50.
34. The provisions of the chapter of the Code of Procedure entitled, "Appeals to the court of appeals," as to the security to be given upon appeals, and as to the stay of proceedings, shall apply to proceedings taken under subd. 3, of section 11,—which relates to appeals to that court from orders in special proceedings, or on summary application in an action after judgment. 2 *Laws of 1866*, 1841, ch. 824, § 13.
35. Where a judgment of reversal by the general term does not state that the judgment of the special term was reversed on questions of fact [see Code of Procedure, § 268], the court of appeals is bound to take the facts, as found by the judge at special term, to be true. They must apply the law to the facts found at special term; and cannot look into the evidence, and affirm or reverse the judgment, as they may agree or disagree with the original tribunal as to the facts. The duty of the court is to determine whether the conclusions of law drawn from the facts, as found by the judge, are sound. *Ct. of Appeals*, 1865, *Crocker v. Crocker*, 31 N. Y., 507; *State of Michigan v. Phoenix Bank*, 33 *Id.*, 9.
36. Ten per cent. penalty imposed upon appellant from a decree of foreclosure, where the answer contained a general denial only, and the appellant submitted no points, and pointed out no error in the proceedings below. *Ct. of Appeals*, 1865, *Warner v. Lessler*, 33 N. Y., 296.
37. An appeal from an order denying a motion for a new trial, made on the judge's minutes, may be taken to the general term, notwithstanding judgment has been entered upon the verdict. [Following 22 How. Pr., 385; and disapproving *Id.*, 386.] Section 349 of the Code of Procedure, giving the right of appeal from such an order, does not limit the right to cases where judgment has not been entered. Should the verdict be set aside, the special term may, on motion, vacate the judgment. *Supreme Ct.*, 1865, *Lane v. Bailey*, *Ante*, 410.
38. The general term of the supreme court have jurisdiction of an appeal to the chancellor from the decision of a vice-chancellor, declaring the right of the complainants, and referring the matter to a master for the proper accounting, which appeal was pending at the time the court of chancery was abolished by the Constitution, &c., in 1846. *Ct. of Appeals*, 1865, *Green v. Givan*, 33 N. Y., 348.
39. Where, on a trial and verdict, "the entry of judgment is stayed, to the end that the party may move for a new trial on a case containing exceptions, the same to be heard in the first instance at general term," and instead of moving at general term, a motion for a new trial on the excep-

ARREST.

- tions is made and decided at a special term, the latter court will treat the directions to have the exceptions heard at general term in the first instance as waived by the parties, and the decision made at special term as the decision of the judge who tried the cause, whether it was so in fact or not. *Supreme Ct.*, 1864, *Ely v. McNight*, 30 *How. Pr.*, 97.
40. Objections not raised on trial, which could have been obviated, not heard at general term. *Supreme Ct.*, 1865, *The People v. Hurlbult*, 44 *Barb.*, 126.
41. Upon a second appeal to the general term, the judgment should be the same as on the first appeal, however much the court may be disposed to question the decision, unless the appeal presents facts different from those on which the former decision was founded. *Supreme Ct.*, 1865, *Freeman v. Auld*, 44 *Barb.*, 14.
42. That a motion cannot be entertained at special term to dismiss an appeal from an order made at special term, but such motion must be made at the general term. *People ex rel. Larocque v. Murphy*, 1 *Daly*, 462.
43. Questions as to the validity of a notice of appeal to the county court, for want of a stamp, cannot be brought before the supreme court on a mere general appeal from the judgment. An appeal should be taken in such case from the order of the county court denying a motion to dismiss the appeal. *Supreme Ct.*, 1865, *Armstrong v. Smith*, 44 *Barb.*, 120.
44. Where an appeal has been properly taken, in the marine court, from the decision of a single judge, to the general term, no single judge of the court has the power to dismiss the appeal. *Ct. of Appeals*, 1865, *Roberts v. Donnell*, 31 *N. Y.*, 446; *S. C.*, *Ante*, 4.

ERROR: HIGHWAYS.

APPEARANCE.

It seems, that the appearance of an attorney without authority is a nullity. [Reviewing the cases.] *Bean v. Mather*, 1 *Daly*, 440.

ARREST.

1. No person holding office under the Niagara Frontier Police act shall be liable to military or jury duty, or to arrest on civil process. *Laws of 1866*, 1075, ch. 484, § 30.
2. The exemption of a party or witness from arrest is a personal privilege, which can be waived; and the waiver is complete when the party or witness fails to claim it at once, and does some act in the cause in reference to his appearance. [8 *Abb. Pr.*, 416; 15 *Barb.*, 29; 7 *Cow.*, 356; 5 *How. Pr.*, 233; 4 *Dall.*, 107; 4 *Hill*, 59; 11 *Mas.*, 11, 14.] Thus, proceeding to justify bail is a waiver of the objection. *N. Y. Com. Pleas*, 1864, *Petrie v. Fitzgerald*, 1 *Daly*, 401.
3. Of the privilege of suitors and witnesses from arrest. *Ib.*
4. Where the plaintiff in an action on contract obtains an order of arrest, on which the defendant is taken, the subsequent exoneration of the defendant from imprisonment for debt, under the provisions of 2 *Rev. Stat.*, 30, § 10, precludes the plaintiff from procuring a second arrest in an action

ASSESSMENT.

sounding in tort, but founded on the same transaction as the alleged cause of action on contract. *N. Y. Superior Ct.*, 1866, *Wright v. Ritterman*, *Ante*, 428.

Thus, a fraudulent purchaser of goods, who has been sued on the contract of sale, and arrested in the action on the ground of fraud in contracting the debt, cannot, after he has been exonerated for imprisonment for debt, be arrested in a suit for damages for conversion of the goods. *Ib.*

5. When a defendant has been discharged from imprisonment under an order of arrest by due course of law, he should not be re-arrested and imprisoned a second time, for the same cause, though in a different form of action. *City Judge of N. Y.*, 1866, *People v. Kelly*, *Ante*, 432.

6. It is not a ground for setting aside an order of arrest that the party had been arrested previously in the same suit, and on the same process, on an election day. The exemption from arrest expires with the day of election, and the parties afterwards stand towards each other as if no previous arrest had been made. [14 *Johns.*, 346; 1 *Wend.*, 32; 5 *Id.*, 90.] *N. Y. Com. Pl.*, *Petrie v. Fitzgerald*, 1 *Daly*, 401.

7. Under the provisions of 2 *Rev. Stat.*, 556, where a defendant has been arrested in the action, the three months within which the plaintiff must charge him in execution is from the last day of the special term for non-enumerated motions, following that at which judgment was obtained. *Supreme Ct.*, *Sp. T.*, 1865, *Haviland v. Kane*, *Ante*, 409.

8. In an action brought to recover the value of chattels of the plaintiff, converted by a defendant, it is not ground for discharging an order of arrest that the defendant has a claim for a larger amount against the plaintiff. *Supreme Ct.*, *Sp. T.*, 1865, *Huelet v. Reyns*, *Ante*, 27.

9. Warrants of, throughout the State in criminal cases, may be executed by members of detective force of Frontier Police district. *Laws of 1866*, 1071, ch. 484, § 21.

10. A deserter is not liable to arrest by any citizen without process. *Supreme Ct.*, 1865, *Trask v. Payne*, 43 *Barb.*, 569.

11. An order of the war department authorizing certain enumerated local magistrates and officers to arrest deserters, is to be construed strictly, and does not empower the deputies of such officers to make the arrest. *Supreme Ct.*, 1865, *Trask v. Payne*, 43 *Barb.*, 569.

12. Arrests for violation of provisions of Metropolitan Sanitary act, authorized and regulated. 1 *Laws of 1866*, 129, ch. 72, § 14, subd. 2; 2 *Id.*, 1462, ch. 686.

13. Officers of Niagara Frontier Police may arrest without warrant in certain cases. *Laws of 1866*, 1073, ch. 484, § 23.

ASSESSMENT.

Where two members of the Board of Revision and Correction of Assessments meet and confirm an assessment, without the presence of or notice to the third, their proceedings are irregular; and the irregularity is not cured by a subsequent formal approval of the minutes when the third member of the board was present, nor by the Act of 1861. *Supreme Ct.*, *Sp. T.*, 1865, *Palmer's Petition*, *Ante*, 30; compare *Beekman's Petition*, 19 *Abb. Pr.*, 244 and *Ante*, 448.

NEW YORK.

ASSIGNMENT OF CAUSE OF ACTION.

1. A demand for services is assignable, and may be assigned by parol; and such an assignment under the Code of Procedure is sufficient to enable the assignee to sue in his own name. *Ct. of Appeals*, 1864, *Hooker v. Eagle Bank of Rochester*, 30 N. Y., 83.
2. That a cause of action against a carrier for loss of a passenger's baggage is assignable, so as to enable the assignee to sue in his own name. *Merrill v. Grinnell*, 30 N. Y., 594.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

The provisions of section 2 of the Act of 1860,—respecting assignments for the benefit of creditors,—which require an assignor, within twenty days after the date of an assignment, to make and deliver to the county judge an inventory of his debts and assets,—and of section 3,—which requires the assignee, within thirty days after the date of the assignment, to give bond,—are directory merely; and an assignment, in other respects good, is valid, and vests a perfect title in the assignee, although not followed by the schedule or bond provided by the statute. [39 Barb., 97; 20 How. Pr., 289; and distinguishing 16 Abb. Pr., 23.] *Supreme Ct.*, 1866, *Van Vleet v. Slauson*, 45 Barb., 317.

ATTACHMENT.

1. An attachment may be issued as a provisional remedy in an action for the wrongful conversion of personal property. 2 *Laws of 1866*, 1838, ch. 824, § 7; amending *Code of Pro.*, § 227.
2. It seems, that in an action between partners for a dissolution of the firm, an accounting, and the payment of an alleged balance, an attachment cannot be issued, though the defendant be charged with fraudulently disposing of the property of the firm. *Supreme Ct.*, *Sp. T.*, 1865, *Ketchum v. Ketchum*, *Ante*, 157.
3. Defendant may move to set aside an attachment against his property without putting in a general appearance in the action. *N. Y. Supreme Ct.*, *Sp. T.*, 1866, *Manice v. Gould*, *Ante*, 255.
4. A mere creditor without judgment, though he has commenced an action, and procured the issue of an attachment, cannot move to set aside a prior attachment, irregularly issued against the property of the same debtor, and levied before his action was commenced. *N. Y. Supreme Ct.*, *Sp. T.*, 1865, *Ketchum v. Ketchum*, *Ante*, 157.
5. Whether, after judgment, the regularity of the attachment can be inquired into in a collateral proceeding, *Quere?* *Ketchum v. Ketchum*, *Ante*, 157.
6. Section 227 of the Code of Procedure,—which authorizes the issuing of an attachment as a provisional remedy,—amended by adding; and for the purpose of this section an action shall be deemed commenced when the summons is issued; provided, however, that personal service of such summons shall be made, or publication thereof commenced within thirty days. 2 *Laws of 1866*, 1838, ch. 824, § 7.

ATTORNEY AND CLIENT.

1. Any regularly admitted or licensed attorney or counselor of the supreme court of this State, and whose office for the transaction of law business is within this State, may practice as such attorney or counselor in any of the courts of this State, notwithstanding he may reside in a State adjoining the State of New York; provided that service of papers, which might, according to the practice of the courts of this State, be made upon said attorney at his residence, if the same were within the State of New York,—shall be sufficient, if made upon him by depositing the same in the post-office in the city or town wherein the said office is located, directed to said attorney at his office, and paying the postage thereon, and such service shall be equivalent to a personal service at the office of such attorney. 1 *Laws of 1866*, 348, ch. 175.

The act of 1862, "to authorize attorneys of the supreme court of this State residing in adjoining States, to practice in the courts of this State," repealed. *Ib.*, § 2.

2. That an attorney can acquire for himself, as against his client, no greater right by the violation of his duty than by the performance of it. Where the relation exists, no infraction or evasion of its obligations can avail to vest the attorney with any right, interest or property which his duty required him to seek or secure for his client. *Supreme Ct.*, 1859, *Cowing v. Greene*, 45 *Barb.*, 585.
3. An attorney cannot serve, professionally, both parties to a controversy; and where he had been retained by one, he cannot recover for professional services rendered in the same matter to the other. *N. Y. Com. Pl.*, *Herrick v. Catley*, 1 *Daly*, 512; *S. C.*, 30 *How Pr.*, 208.

BAIL.

The liability of bail remains the same as it was before the Code. Bail, under the old system, undertook to produce the body of their principal, so that he should be amenable to final process in the action in which they became bail, whenever such process was issued. The theory on which they became bail was, that the body of the debtor was delivered into their custody, and, carrying out that theory, bail were invested with full powers by the law, to seize their principal at any time and deliver him up, in discharge of their liability. This they were authorized to do without process, and by virtue solely of the relation existing between them as principal and bail. Section 191 of the Code provides the mode in which this liability may be discharged. Insolvency of the defendant does not discharge nor diminish it. *Ct. of Appeals*, 1865, *Metcalf v. Stryker*, 31 *N. Y.*, 255.

BILLS, NOTES AND CHECKS.

Where a creditor made a loan to his debtors upon an agreement that they would repay it out of the proceeds of a note for a much larger amount which they had procured to be indorsed by a third person for their accommodation, or would deliver the note to him; and the note not being discounted, they subsequently delivered it to him, in satisfaction of the loan and of their prior indebtedness;—*Held*, that the contract was to be regarded as entire, and that he had parted with a new consideration suf-

BURDEN OF PROOF

ficient to make the indorsement binding. *N. Y. Superior Ct.*, 1863, *Smith v. Mulock*, *Ante*, 375.

It seems, that the indorser in such case would not be exonerated by mere proof of notice to the purchaser of the note, that the partnership between the makers had been dissolved subsequent to the date of the note. *Ib.*

BANKRUPTCY.

Of the requisite proceedings to obtain a discharge under the English insolvent laws; and what must be pleaded in setting up a discharge under such statutes. *N. Y. Superior Ct.*, 1865, *Philippe v. James*, *Ante*, 311.

DISCHARGE.

BOARD.

ASSESSMENTS: LOAN COMMISSIONERS: NOTICE.

BOND.

1. A bond given to discharge a vessel from an attachment under the act of 1862, is not void by reason of irregularities in the issuing of an attachment. (Per *ROBERTSON*, Ch. J.) *N. Y. Superior Ct.*, 1866, *Delaney v. Brett*, *Ante*, 421.
2. Where one of several defendants, against whom a personal judgment had been recovered, gave a bond with sureties, conditioned for the payment of the amount of the judgment whenever ordered by the final decision of the court, such bond being given as a condition imposed by the court for refusing to appoint a receiver of specific property, upon which the judgment against the defendant had been declared a lien;—*Held*, that it was no defence to an action on such bond, that, upon an appeal, the judgment was subsequently modified by reversing it so far as it imposed any personal liability upon the defendant who gave such bond, and affirming it as to the others. *N. Y. Superior Ct.*, 1863, *Ford v. Townsend*, *Ante*, 159.

BOUNTIES.

The provisions of sections 3 and 4, of chapter 29, of the laws of 1865, prescribing a maximum payment for enlisting soldiers, is void. *Supreme Ct.*, *Sp. T.*, 1865, *Powers v. Shepard*, *Ante*, 129.

As the statute interferes with individual freedom of action, it must be construed like a penal statute, strictly; and does not therefore forbid a contract for the procurement of volunteers at a higher price than six hundred dollars. *Ib.*

BROOKLYN.

Provisions relative to the appointment of a phonographic reporter, in the Brooklyn city court. 1 *Laws of 1866*, 671, ch. 311.

BURDEN OF PROOF.

EVIDENCE.

CAUSE OF ACTION.

CASE

APPEAL, 21, 24, 32: EXCEPTIONS.

CAUSE OF ACTION.

1. A cause of action for damages for injuries to real property by the negligence of the defendant, is necessarily local; and the courts of this State have not jurisdiction of such an action relating to real property without the State. *N. Y. Superior Ct.*, 1863, *Mott v. Coddington*, *Ante*, 290.
2. But a cause of action for breach of a covenant to convey real property, is transitory; and if the courts of this State obtain jurisdiction of the parties, they can entertain jurisdiction of the action. *Ib.*
3. An executrix received as collateral security for the payment of a personal debt due to the estate, the assignment of a mortgage held in trust by the debtor, for which assignment there was no legal consideration; and collected the money due on the mortgage, and distributed the same among the next of kin and legatees of the estate. In an action brought by the *cestuis que trust* against the next of kin and legatees, to recover the moneys thus distributed to them;—*Held*, 1. That such next of kin and legatees were liable therefor. 2. That the rights of the parties were not altered by the fact that the defendants received at the same time, other moneys than those arising out of such mortgage. 3. That having received the plaintiffs' money without giving value for it, they were liable therefor, though mixed with other money belonging to them at the time of receiving it. *Ct. of Appeals*, 1865, *Green v. Givan*, 33 *N. Y.*, 343.
4. Where lands are granted to a municipal corporation by the State, with a proviso giving a preemptive right to adjoining owners, the State, only, can re-enter for a breach of the proviso, by the act of the corporation in granting to one who is not the true owner of the adjacent upland; and until it does so, such a grant cannot be annulled in a collateral inquiry. *N. Y. Superior Ct.*, 1863, *Towle v. Palmer*, *Ante*, 81.
5. Where persons are in the actual use and occupation of premises on which mills are located, and they, and those under whom they claim, have been in possession thereof for a number of years, and an adjoining proprietor erects a dam below such mills, upon the same stream, by means of which the water is set back upon the wheels in such mills, thereby reducing the power thereof and injuring the mills, an action will lie for damages by the mill owners. *Ct. of Appeals*, 1864, *Brown v. Bowen*, 30 *N. Y.*, 519.
6. The occupant of the premises injured by the setting back of water upon the land, may recover damages against the wrong-doer, to an amount sufficient to indemnify him for the injury to such interest as he had in the premises. *Ib.*
7. An action will also lie by the reversioner, for the injury done to the inheritance. *Ib.*
8. One whose goods are taken by the sheriff in proceedings of claim and delivery, in an action against a third person, can maintain an action against the sheriff for damages, notwithstanding his having given the sheriff notice of his claim, under section 216 of the Code of Procedure, and sub-

- sequently having withdrawn it for the purpose of permitting the sheriff to deliver the goods. *N. Y. Superior Ct.*, 1863, *Haskins v. Kelly*, *Ante*, 63.
9. Where an usurious loan is secured by a pledge, one who purchases the thing pledged from the borrower, and agrees to pay the debt, is not a borrower within the meaning of the statute of 1837,—which allows borrowers on usury to maintain actions for relief against their contracts, without paying, or offering to pay, the principal or interest. *N. Y. Superior Ct.*, *Beecher v. Ackerman*, *Ante*, 141.
 10. But in an action by the purchaser for relief from the usurious contract, the complaint should not be dismissed at trial merely because it does not contain an offer to pay what is equitably due, but he may have judgment for such relief, conditioned upon his making such payment, with costs. *Ib.*
 11. Where, after such a transaction, the purchaser of the securities obtains a further usurious loan from the same lender, giving one note for the total amount, and pledges other property to secure the whole, the property last pledged cannot be retained by the lender as security for the original loan. *Ib.*
 12. Where securities are delivered and accepted in payment of a usurious loan, with a guaranty, by the debtor, of the payment of such securities, the debtor cannot recover back the securities; but the guaranty is void, and he may compel the surrender of that. *Ib.*
 13. An action will lie by a partner, to enjoin an individual judgment creditor or the copartner of the plaintiff, from selling upon execution the interest of the copartner in the partnership assets, where it is made to appear by the complaint that the copartner whose interest has been seized has no interest in fact in the assets, and the plaintiff offers to submit to an accounting to show this to be the case. *N. Y. Com. Pleas*, *Sp. T.*, 1866, *Turner v. Smith*, *Ante*, 304.
 14. *It seems*, that since the abolition of the distinction between legal and equitable forms of procedure, the court out of which the execution was issued should stay proceedings thereon, under such circumstances, without putting the parties to an action. *Ib.*
 15. An injunction will not lie at the suit of the owner of a wharf or bulk-head, having a mere easement in the nature of wharfage in respect to the land under water in front thereof, to prevent the erection of a pier or wharf by an adjoining owner under the sanction of public authority. *N. Y. Supreme Ct.*, 1865, *Taylor v. Brookman*, *Ante*, 169.
 16. If injured by such erection, his remedy is by an action for damages for the obstruction of his easement; or, if he can show title to the land on which the erection is made, by an action to recover possession thereof. *Ib.*
 17. Where the complaint alleged that the plaintiff and defendant had made an oral agreement to carry on the business of publishing books, to which the plaintiff was to contribute contracts with authors, &c., and was to give his personal attention for several years at a salary, and afterwards to have an interest in the business, and further alleged that under such agreement the defendant had become possessed of the stereotype plates of certain books, the right to publish which, upon terms set forth in the complaint, was contributed by the plaintiff; but that the defendant refused to per-

- form the agreement or to form the business connection contemplated, although the plaintiff had been at all times ready and willing, and had offered to perform; and that the defendant was proceeding to publish such books in his own name, denying that the plaintiff had any interest therein and refusing to surrender the plates and books, though the plaintiff had demanded them, and offered to indemnify him;—*Held*, that these facts were sufficient to constitute a cause of action for a surrender of the books and plates, and an accounting. *N. Y. Superior Ct.*, 1863, *Redfield v. Middleton*, *Ante*, 15.
18. The courts of this State will not entertain an action sounding in tort,—*e. g.*, an action for damages for defrauding the plaintiff by false representations brought by the citizen of one foreign State against the citizen of another foreign State, for the alleged injuries committed in one or both of the States. [14 *Johns.*, 134; 1 *Cow.*, 543; 17 *Wend.*, 323; 8 *Abb. Pr.*, 318; 6 *Id.*, 165.] *Supreme Ct.*, 1865, *Latourette v. Clark*, 45 *Barb.*, 327; *S. C.*, 30 *How. Pr.*, 242.
19. An action cannot be maintained against the city of New York for labor or supplies furnished for the benefit of the city by contract with the city officers, where no appropriation has been made for the expense, and where the necessity for the work or supplies has not been certified by the head of the appropriate department, and the expenditure authorized by the Common Council. [1 *Laws of 1857*, 884, § 28; 886, § 38; *Laws of 1863*, 310, § 3.] *Ct. of Appeals*, 1865, *Donovan v. Mayor, &c.*, of *N. Y.*, 33 *N. Y.*, 291; reversing *S. C.*, 19 *Abb. Pr.*, 58.
20. An action lies to recover back a sum of money recovered under the award of public officers,—*e. g.*, a board of State officers, although acting substantially in a judicial capacity, where such award was obtained by actual fraud and imposition practised by the party obtaining it, upon the tribunal, and where the payment was made before the party making it had discovered the fraud. *Ct. of Appeals*, 1865, *State of Michigan v. Phoenix Bank*, 33 *N. Y.*, 9.
21. The father, as administrator of his infant son deceased, may maintain an action for damages occasioned by causing the death of such infant by the wrongful act, neglect, and default of the defendant. To warrant such recovery under the statute, it is not indispensable that the deceased should leave him surviving “a widow and next of kin.” *Ct. of Appeals*, 1865, *McMahon v. Mayor, &c.*, of *New York*, 33 *N. Y.*, 642.
22. An action, brought against an out-going lessee, to recover the amount laid out in putting a house in repair under a covenant on his part in the lease to leave the premises in good order, is an action upon the covenant and not an action in tort. *N. Y. Com. Pl.*, 1865, *Hatch v. Wolfe*, *Ante*, 77.
23. Where one receives, at the request of A., a sum of money from a third person, with directions to pay the same to B., this is equivalent to an express promise to pay such sum to B., and the latter may maintain an action for money had and received. [12 *Johns.*, 276; 1 *H. Black*, 229; 2 *Raym.*, 928; 6 *Modern R.*, 36; 14 *East*, 590, *n.*; 2 *Camp. N. P. C.*, 426; 3 *Id.*, 109; 2 *Hilt.*, 1; 4 *Den.*, 97.] No consideration between plaintiff and the third person need be shown. [17 *How. Pr.*, 289]. *N. Y. Com. Pl.*, 1861, *Berry v. Mayhew*, 1 *Daly*, 54.

CERTIORARI.

24. Under such circumstances it is no defence that another party claims the same sum ; but the money should be paid into court, and such third party brought in by way of interpleader. *Ib.*
25. Money paid on a contract, or on a judgment recovered upon a contract, may be recovered back in an action therefor, upon a failure of consideration arising subsequent to the payment, by which the contract becomes wholly voidable. The judgment in such case is not an estoppel. [15 Mass., 207.] A party may be relieved in a court of equity from a recovery when he can show it to be against conscience to execute the judgment, by reason of some fact of which he could not avail himself on the trial. [Willard's Eq., 356 ; Story's Eq., §§ 874, 886, 887 ; 37 Barb., 199 ; 26 How., 494 ; 34 Barb., 515.] When facts have arisen since a judgment was entered, of such a nature that it is clear the judgment ought not to be executed, relief against the judgment may be given. *Supreme Ct.*, 1866, *Smith v. McCluskey*, 45 Barb., 610.
26. The law of the country where the action is brought governs only the remedy, and cannot be invoked to create a right, or to make an act tortious, which was not such at the time and place of its commission. *So held*, in case of negligence causing death on the high seas. *Supreme Ct.*, 1865, *Mahler v. Norwich and New York Transportation Company*, 45 Barb., 226.
27. Long Island sound is not within the territorial limits of this State within this rule. *Ib.*
28. Under the Code of Procedure,—which authorizes the assignee and owner of a demand to prosecute for it in his own name,—one to whom a debt resting in account is assigned, together with the debtor's note for a portion of the account, may surrender the note and sue in his own name upon the original demand, provided it was assigned to him contemporaneously with the note. *Supreme Ct.*, 1864, *Armstrong v. Cushney*, 43 Barb., 340.

ASSIGNMENT : COMPLAINT : COSTS, 6 : CREDITOR'S SUIT : ELECTION OF REMEDIES : EVIDENCE : INTERPLEADER : JOINT LIABILITY : MALICIOUS PROSECUTION : MISTAKE : PARTIES : PLEADING : SPECIFIC PERFORMANCE : UNDERTAKING : VENDOR AND PURCHASER.

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1. When a party has another adequate remedy, he must resort to it, rather than to the writ of *certiorari*. [1 Hill, 195 ; 2 Id., 12.] *Supreme Ct.*, 1865, *The People v. Overseers of the Poor of the town of Berne*, 44 Barb., 467.
2. A board of supervisors in passing resolutions to provide for raising money upon the credit of the county, for the use of said county, or upon the credit of any town thereof, for the use of such town, for the purpose of paying bounties to volunteers into the military or naval service of the United States, under the authority given by the act of February 8, 1864 (Laws, ch. 8), are not acting in a judicial but in a purely legislative capacity, and the supreme court can neither affirm nor reverse, or set aside, mere initiatory resolutions of that character, or make any order in respect to them

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upon *certiorari*. *Supreme Ct.*, 1864, *People v. Supervisors of Livingston County*, 43 *Barb.*, 232.

3. A *certiorari* will not lie to bring up the incipient resolutions or proceedings upon which a tax may ultimately be based, before any tax is laid, or any final determination had in the matter. If a writ of *certiorari* will lie to a board of supervisors, it is premature before the proceedings instituted or pending are completed or ended. It will only lie to bring up the *final adjudication* of such court or tribunal. [20 *Johns.*, 80; 3 *Abb.*, 194; 26 *Barb.*, 637.] *Supreme Ct.*, 1864, *People v. Supervisors of Livingston County*, 43 *Barb.*, 231.
4. A *certiorari* to review an assessment made by the commissioners of taxes and assessments of the city and county of New York, will not lie after the assessment-roll has been delivered by the commissioners to the board of supervisors, and the tax has been collected. The statute gives the *certiorari* as a matter of right, and there is, indeed, in express words, no limitation of the right in point of time; but looking at the whole statute, and the purpose of the *certiorari*, it appears to be the intention of the legislature that the *certiorari* should be applied for, allowed and served, before the time fixed by the statute (§ 13) for the assessment-rolls leaving the hands of the commissioners. After that, the commissioners have no longer any control over the assessment complained of, and cannot correct or reduce it, and it would be a useless ceremony to reverse the act of the commissioners after the assessment-rolls had been delivered to the board of supervisors, and the tax complained of had been paid or collected. *Supreme Ct.*, 1865, *People v. Commissioners of Taxes*, 43 *Barb.*, 494.
5. A *certiorari* will not be allowed, for the purpose of enabling a party, by procuring a reversal of the proceedings of the commissioners of taxes, to recover back, by action, money paid by him for taxes. *Supreme Ct.*, 1865, *People v. Commissioners of Taxes*, 43 *Barb.*, 494.
6. It seems, that a *certiorari* would lie to review an actual final assessment of a tax, although it is in the discretion of the court to issue or refuse it. *People v. Supervisors of Livingston County*, 43 *Barb.*, 232.
7. A *certiorari* intended to review an order for commissioners of highways, directing the removal of an encroachment, which is directed to the jury instead of the commissioners, is a nullity.
 1. In order to procure a reversal of the order, it is necessary that the order should be brought up, and made part of the record. This cannot be done by a *certiorari* directed by the jury. They have no custody of it; and could only return upon any view a mere narrative of the proceedings before them.
 2. Such a writ cannot properly bring up even the finding of the jury. They are no longer a legal body after their verdict is signed, and they have separated; and neither they, nor any one as foreman on their behalf, can make a return.
 3. Even if the commissioners of highways voluntarily appear and defend, no jurisdiction can be acquired under such a writ. The supreme court can neither reverse nor affirm, but should dismiss the writ with-

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out costs. *Ct. of Appeals*, 1864, *People ex rel. Hunting v. Commissioners of Highways of East Hampton*, 30 N. Y., 72.

8. Where assessors, in their return to a *certiorari*, state that they have delivered the assessment-roll, duly certified, to the supervisors of the town, and that the same is not in their possession or control, the court has no power to render any judgment that can affect the assessment-roll, or correct any errors; although it is satisfied there was clear error in the proceedings. The only remedy of the person aggrieved is by an action against the county, to recover back the amount of the tax improperly levied. *Supreme Ct.*, 1865, *People v. Reddy*, 43 *Barb.*, 539.
9. Of what the return to a *certiorari* to review the assessment of a tax should contain. *Magee v. Cutler*, 43 *Barb.*, 239.
10. The court will not disturb the finding of the justice below on a question of fact upon which the evidence before him was conflicting. *Supreme Ct.*, 1865, *People ex rel. Stover v. Stiner*, 30 *How. Pr.*, 129.
11. When the return of the justice may be set aside, or an amended return compelled. *Smith v. Johnston*, 30 *How. Pr.*, 374.

SUMMARY PROCEEDINGS, 11.

CHARGE..

TRIAL.

CHATTEL MORTGAGE.

1. It is the duty of the register to index a chattel mortgage duly filed with him; and his omission to do so cannot prejudice the lien of a mortgagee who has done all required of him to make the mortgage valid. [18 *Barb.*, 193.] *N. Y. Com. Pl.*, 1865, *Dikeman v. Puckhafer*, *Ante*, 32.
2. Where the mortgager of chattels borrows money to buy in the mortgage, and procures an assignment of it to the lender, as security for repayment of the loan, the mortgage becomes, in the hands of the latter, a mere pledge for the loan, and is discharged by a tender thereof. *N. Y. Superior Ct.*, 1863, *Haskins v. Kelly*, *Ante*, 63.

DEMAND: FORECLOSURE, 1.

CLAIM AND DELIVERY.

1. Inasmuch as the law requires the sheriff, upon an attachment, to take the property into his custody, the spirit of section 207, subd. 4, of the Code of Procedure must be considered to forbid the use of the provisional remedy for the claim and delivery of personal property which has been taken by the sheriff on an attachment in a former action, notwithstanding the attachment upon which the property was taken was not against the *plaintiffs* literally, but only against *some of them*. *Supreme Ct.*, 1864, *Smith v. Orser*, 43 *Barb.*, 187.
2. A requisition in proceedings of claim and delivery to recover possession of goods, in an action brought for the purpose, against one who purchased them at a wrongful sale, will justify the sheriff in taking them, although

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the defendant acted as an agent in the purchase, if the papers are served and the seizure made while the goods remain actually in his possession. *N. Y. Superior Ct.*, 1863, *Haskins v. Kelly*, *Ante*, 63.

COMPLAINT.

1. The complaint averred a fraudulent agreement between the defendants L. and L., composing a copartnership, and G., to obtain goods on G.'s credit, on representations made by L. of G.'s solvency and good standing; and alleged that the representations of L. to the plaintiffs, and the purchase made of the plaintiffs by G., on such representations, "were made in pursuance of such fraudulent agreement, and were a device and contrivance" between L. and G., to obtain the goods of the plaintiffs:—*Held*, on an appeal from judgment after verdict, that the complaint was sufficient. It matters not what the claim is termed in the complaint, or what word is employed by the defendant to express the legal effect or result of the acts alleged. It is enough that they form the basis of a demand. Nor is it necessary to aver that the representations on which the plaintiffs parted with their goods "were false." It is sufficient to allege that they were made by the defendants, well knowing the truth to be the converse. *N. Y. Com. Pl.*, 1861, *Ballard v. Lockwood*, 1 *Daly*, 158.
2. Where there are several sections of a statute creating a cause of action, differing in their legal effect and in the remedies provided, and the complaint in an action under the statute is so drawn that it may include claims under more than one provision, the plaintiff may be required, on motion, to make it more definite and certain in this respect. *N. Y. Com. Pl.*, 1866, *Arrieta v. Morrissey*, *Ante*, 439.
3. In an action to recover back money lost at play, the complaint is obnoxious to a motion that it be made more definite and certain, unless it states the facts necessary to show clearly under which of the several sections of the statute of Betting and Gaming, the action be brought. *Ib.*
4. Section 6 of the Laws of 1860, ch. 379,—requiring the plaintiff, in all actions against the corporation of New York city, to allege in his complaint a presentment of his claim to the comptroller, and the refusal of the latter to pay or adjust the same,—is not restricted to any particular class of cases. It applies to claims for damages. *N. Y. Com. Pl.*, 1863, *Russell v. Mayor of New York*, 1 *Daly*, 263.
5. To justify the omission to join one of several joint debtors as a party defendant with the others, it must appear by averments in the complaint, which lead to no other conclusion, that the legal obligation of such person had absolutely ceased. It is not enough to show that the statute of limitations has run against the omitted defendant. *N. Y. Com. Pl.*, 1865, *Hyde v. Van Valkenburg*, 1 *Daly*, 416.
6. A complaint seeking to set aside conveyances and other instruments affecting real property, on the ground that they were obtained by fraud, is not sustained by proof that they constitute a mortgage from which the plaintiff has a right to redeem. This is not a mere variance, but a failure to

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prove the cause of action in its entire scope and meaning. *N. Y. Superior Ct.*, 1863, *Patterson v. Patterson*, *Ante*, 262.

CAUSE OF ACTION, 10, 13, 17, 19, 28: INTERPLEADER: JOINDER OF ACTIONS: MECHANIC'S LIEN, 7: PLEADING.

COMPUTATION OF TIME.

TIME.

CONDITIONS.

In determining whether a condition in a deed is precedent or subsequent, the main test is whether the vesting of the estate granted by the instrument containing it, is postponed until the happening of the contingent event forming the condition, or is to be divested by it. *N. Y. Superior Ct.*, 1863, *Towle v. Palmer*, *Ante*, 81.

DEEDS, I.

CONFESSION OF JUDGMENT.

1. A statement of an indebtedness for money loaned;—*Held*, sufficient, notwithstanding the dates and amounts of the loans constituting one of the sums alleged, were not specified in detail. [20 *N. Y.*, 447; 22 *Id.*, 418.] *Ct. of Appeals*, 1864, *Frost v. Koon*, 30 *N. Y.*, 428.
2. A statement in effect that the defendant had purchased of the plaintiff a certain indebtedness (describing it) due to the plaintiff, for which he had given to the plaintiff the promissory notes (describing them) upon which, and for the amount of which he confessed the judgment, is a sufficient statement to sustain such judgment. In such case it is not necessary to set forth the consideration of the debt purchased. *Ct. of Appeals*, 1865, *Kirby v. Fitzgerald*, 31 *N. Y.*, 417.
3. Statement for confession of judgment on a promissory note upon which the plaintiff was only contingently liable as indorser;—*Held*, insufficient. *Ingram v. Robbins*, 33 *N. Y.*, 409.
4. Statement for confession of judgment on a promissory note given for arrears of salary and interest thereon;—*Held*, sufficient. *Kellogg v. Cowing*, 33 *N. Y.*, 408.
5. A verification of a statement for confession of judgment, which merely states that the party "believes the above statement of confession is true," is insufficient. *So held*, where the facts contained in the statement were chiefly within the personal knowledge of the deponent. *Ct. of Appeals*, 1865, *Ingram v. Robbins*, 33 *N. Y.*, 409.
6. In requiring a party confessing judgment to verify the statement, the legislature intended that in so far as it related to things within his own knowledge, he should affirm it to be true. A statement that he believes it, is something considerably short of this. It is a qualification of the direct affirmation of the existence of the fact. Besides, the word is inappropriate when used in relation to a fact which the party either knows, or does not know. *Ct. of Appeals*, 1865, *Ingram v. Robbins*, 33 *N. Y.*, 409.

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7. A verification in terms that "the facts stated in the above confession are true," is sufficient. *N. Y. Supreme Ct., Sp. T.*, 1865, *Mosher v. Heydrich*, *Ante*, 258.
8. A judgment upon confession may be entered in any county, without restriction to the county in which the statement was verified. *N. Y. Supreme Ct., Sp. T.*, 1865, *Mosher v. Heydrich*, *Ante*, 258.
9. Where a judgment is confessed directly to a third party, who takes the same in good faith and for value, it cannot be impeached as against him, for fraud existing between the original parties to the alleged indebtedness; but this rule does not apply where the judgment is confessed in the first instance to the original creditor, and is assigned by him to the third party as security. Such transfer merely confers the rights of an assignee, which rights are subject to all just defences which could have been set up against the assignor. *Ct. of Appeals*, 1865, *Kirby v. Fitzgerald*, 31 *N. Y.*, 417.
10. Where a statement for a judgment entered upon confession is insufficient through mistake of the attorney, or is insufficiently verified, but it is shown that the demand was valid, and the statement made in good faith, the order on a motion to vacate, should be that the plaintiffs, on paying costs of the motion, have leave to amend, by placing on file a statement properly verified, and that in default of doing so, the motion be granted. [27 *N. Y.*, 300.] *Ct. of Appeals*, 1865, *Ingram v. Robbins*, 33 *N. Y.*, 409.

CONTEMPT.

1. Where an attachment as for a contempt is issued against a party on an affidavit taken before an officer not authorized to take an affidavit at the place where it was taken, the attachment must be regarded as issued without due proof by affidavit as required by statute, and the attachment, and all proceedings thereunder, must be vacated and set aside, as granted without authority, notwithstanding sufficient may have appeared in the party's answers to the interrogatories subsequently filed without resorting to the affidavits upon which the attachment was granted. The proceeding is void from its inception. [11 *Wend.*, 647.] *N. Y. Com. Pl.*, 1865, *People ex rel. Larocque v. Murphy*, 1 *Daly*, 463.
2. On a motion to commit a party for contempt, he should be permitted to read, in addition to his answers to the interrogatories propounded to him, affidavits negating wilful disobedience of the order for the violation of which it is sought to punish him. *N. Y. Com. Pl.*, 1865, *People ex rel. Larocque v. Murphy*, 1 *Daly*, 463.
3. The proper remedy for a party committed for a contempt under a void process, is to move the court upon affidavits disclosing the fact, for an order vacating it, and discharging the party; and where the judge who issued such process is no longer a member of the court, the motion may be made before any judge sitting at special term. *Ib.*
4. The proper practice upon proceedings by attachment to punish for contempt, in disregarding an order to appear, and be examined on supplementary proceedings,—stated. *De Witt v. Dennis*, 30 *How. Pr.*, 131.

CONTRIBUTION.

Where a building was insured in two companies, and each policy contained provisions that the company might rebuild instead of paying the loss, and both companies united in notifying the insured, after a loss, of their intention to rebuild;—*Held*, in an action brought against one of the companies, that the plaintiff was entitled to recover the full amount of his damage against such company, leaving it to seek contribution from the other company on its own motion. *Ct. of Appeals*, 1865, *Morrell v. Irving Fire Insurance Company*, 33 N. Y., 429.

CORPORATIONS.

1. In no case, except in respect to moneyed corporations, or insolvent corporations, can a stockholder have a receiver appointed, and a preliminary injunction, with authority to take entire possession of the corporation, and thereby work its dissolution.

The court has power to restrain a corporation, or its trustees or directors, by injunction, from doing any act in violation of its charter, or misapplying the funds of the corporation; but it must be against such specific acts, and not to enjoin them from carrying on the legitimate business of the corporation. *Supreme Ct.*, 1865, *Howe v. Deuel*, 43 Barb., 504.

2. That the court cannot grant an injunction and appoint a receiver, which will totally suspend the business of the corporation, until after judgment or decree. *Ib.*

INJUNCTION, 5, 7: MUNICIPAL CORPORATIONS: RELIGIOUS CORPORATIONS.

COSTS.

1. An agent for the collection of negotiable paper who fails to take the necessary steps to charge the indorsers thereof, is not liable to the owner for the costs of an unsuccessful suit by the latter against the indorsers, unless, by some misrepresentation or other act, he induced the bringing of such suit. *N. Y. Superior Ct.*, 1863, *Ayrault v. The Pacific Bank*, *Ante*, 381.
2. Where the attorney of the plaintiff takes from him an assignment of the judgment recovered, as collateral security for the amount of costs he has included in such judgment, and the plaintiff continues the prosecution of the action through an appeal, on which the judgment is reversed, the attorney and assignee is not liable for the costs. 1. The attorney having a lien for the costs, his position is not changed by having that right established by actual convention. 2. The assignment of an interest in a demand as collateral to a debt, the assignor continuing the prosecution of the suit and remaining liable for the debt until it is paid, does not render the assignee liable for costs. [20 Wend., 630.] *Ct. of Appeals*, 1865, *Wolcott v. Holcombe*, 31 N. Y., 125.
3. That a judgment against an executor, dismissing a complaint filed by him with costs, but containing no direction that he shall pay the costs person-

ally, can only be collected from the assets in his hands as executor. *Ct. of Appeals*, 1864, *Dodge v. Crandall*, 30 N. Y., 294.

4. In actions or proceedings pending on the 26th of April, 1866, if the defence depend on a deed by the treasurer and county judge on a tax sale under the Laws of 1850, ch. 298, the party defendant, or any one of several parties defendant therein, may serve upon the party plaintiff an offer in writing that the party plaintiff may take judgment for the relief demanded in the complaint, and then the party plaintiff shall not recover costs against the defendant serving such offer in writing. 2 *Laws of 1866*, 1825, ch. 820, § 2.
5. Where the amount of an offer under § 385 of the Code, exceeds, with interest to the date of the judgment, the amount of the judgment actually recovered, the latter, though larger than the actual offer, is not "a more favorable judgment," within the meaning of that section, and does not carry costs. *Supreme Ct., Sp. T.*, 1865, *Tilman v. Keane*, *Ante*, 23.
6. The action being prosecuted in the Supreme Court for the same cause, and upon the same pleadings, and on the trial the plaintiff having withdrawn, and abandoned all claims for acts done on the road or right of way set up by the defendant, and having recovered a small verdict for the other trespasses complained of on the other portions of the *locus in quo*, he is, nevertheless, entitled to the costs of the action. Because the *gravamen* of the complaint is trespass *quare clausum fregit*, and the destruction of the grass, herbage, grain and vegetables, are matters of description and aggravation, and the defendant having set up a right of way as to all the alleged unlawful entries charged, his defence goes to the whole matter of the complaint, and a recovery by the plaintiff, however small the amount, entitles him to costs. *Supreme Ct.*, 1865, *Hall v. Hodskins*, 30 *How. Pr.*, 15.
7. On dismissing the complaint as against a defendant who should not have been joined, but who was not united in interest with the defendant and made a separate defence, the court may, in their discretion, refuse to award him costs. [Code of Pro., § 306]. *Supreme Ct.*, 1865, *Porter v. Mount*, 45 *Barb.*, 422.
8. Where the complaint presents a *prima facie* case of jurisdiction, and the question is not raised by the issues, but the plaintiff, on the trial, admits the fact of non-residence, which shows the want of jurisdiction, and the complaint is dismissed on that ground, the defendant may have a judgment for costs. The rule that costs will not be allowed on the dismissal of a complaint for want of jurisdiction, applies only in cases where the want of jurisdiction appears on the face of the summons or complaint, or the court is called upon to adjudicate the question on plea or demurrer. *N. Y. Com. Pl.*, 1860, *Harriott v. N. J. R. R. & T. Co.*, 1 *Daly*, 377.
9. Neither party should have costs upon an appeal, where neither party entirely prevails. *Supreme Ct.*, 1865, *Williams v. Fitzhugh*, 44 *Barb.*, 321.
10. Executors, chargeable with costs in the discretion of the court for not paying over interest. *Dubois v. Sands*, 43 *Barb.*, 412.
11. The provision of the Code of Procedure (*Code of Pro.*, § 321) in respect to the liability for costs of persons not parties to the record, is broader than the former practice of the courts, or the corresponding provision of the Revised Statutes (2 *Rev. Stat.*, 515, § 47, 2nd ed.). It embraces the

COUNTER-CLAIMS.

- case of one defending an action in the name of the defendant on the record, and of a respondent on appeal; whereas the former law was limited to one prosecuting in the name of a plaintiff under such circumstances. [18 Wend., 672; 19 Id., 151; 1 Hill, 646.] The Code, however, requires that the cause of action should have become the property of the person sought to be charged, by means of an assignment or otherwise. *Ct. of Appeals*, 1865, *Wolcott v. Holcomb*, 31 N. Y., 125.
12. Where a senior mortgage has been foreclosed without making a junior mortgagee party to such foreclosure suit, the junior mortgagee may redeem by paying the mortgage debt, principal and interest, without paying the costs of the previous foreclosure. He is not affected by the foreclosure suit to which he was not made a party, and stands in relation to it, as though there had been no such suit. *Ct. of Appeals*, 1865, *Gage v. Brewster*, 31 N. Y., 218.
13. Costs fixed as follows: To the plaintiff, for all proceedings after notice and before trial, fifteen dollars; for each additional defendant served with process, not exceeding ten, two dollars; and for each necessary defendant in excess of that number, served with process, one dollar. *Code of Pro.*, § 307, subd. 1, as amended by 2 *Laws of* 1866, 1840, ch. 824, § 11.
14. Section 307, subd. 3, of the Code, amended by adding: To the plaintiff, for the appointment of a guardian to an infant defendant, ten dollars; but no more than ten dollars shall be allowed for the appointment of guardians in any one action. To the plaintiff, for procuring an order of injunction, ten dollars. 2 *Laws of* 1866, 1840, ch. 824, § 11.
15. Where, in an action to enforce a mechanic's lien against several defendants who appear by the same attorney, the complaint is dismissed on the trial, on motion, on the ground that it does not contain facts sufficient to constitute a cause of action, without any trial of the issues raised by the answers, separate bills of costs should not be allowed to the defendants for separate defences were not necessary. *N. Y. Com. Pl.*, 1859, *Bailey v. Johnson*, 1 *Daly*, 61.
16. Where the question is a new one, no costs of motion are allowed to either party. *Supreme Ct., Sp. T.*, 1865, *The People v. Assessors of Town of Barton*, 44 *Barb.*, 148.
17. What is a reasonable extra allowance in an action of unusual character, and involving \$5,000,000. *People v. New York Central R. R. Co.*, 30 *How. Pr.*, 148.
- DISCONTINUANCE: DISMISSAL OF COMPLAINT, 1: JUSTICE'S COURT: NEW TRIAL, 17: REFERENCE, 2: SURROGATE'S COURT, 6, 7: WITNESS.

COUNTER-CLAIMS.

1. In an action to compel defendant to deliver up bills of lading covering goods consigned to the plaintiff, a claim on the part of the defendant for the price and value of the identical goods which are the subject of the action, is a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or is at least connected with the subject of the action, and is strictly a counter-claim, within § 150 of the Code of Procedure. *Ct. of Appeals*, 1864, *Thompson v. Kessel*, 30 *N. Y.*, 383.

COURTS.

2. In an action by a vendor on a note given for purchase money, the purchaser cannot set up as a counter-claim, damages sustained by the removal of the building on premises sold, by a tenant under a lease which was outstanding at the time of the conveyance. The purchaser, as owner of the reversion, has his remedy against the lessee in an action for waste [1 Just., 51; Kerr's Action at L., 93]; or if the lessee had a right to take the house away, his remedy was upon the covenant in the vendor's deed. *N. Y. Com. Pl.*, 1861, *Ogilvie v. Lightstone*, 1 *Daly*, 129.
3. The redemption of a promissory note by the pledgor, on payment of an advance made upon it, will not carry with it the right of equitable set-off of a claim against the pledgee, in a suit by the pledgor against the maker of the note. *N. Y. Com. Pl.*, 1862, *Thompson v. Harrison*, 1 *Daly*, 302.

COUNTY COURT, 2: PLEADING, 14.

COUNTY COURT.

1. The jurisdiction of county courts in an action to foreclose mortgages (18 N. Y., 51; 17 How. Pr., 35) involves the power to try such actions in the ordinary way, and in so doing to entertain and dispose of all the direct and incidental issues properly arising therein, to the same extent in all respects as if the action had been commenced in the supreme court. *Otsco Co. Ct.*, 1865, *Hall v. Hall*, 30 *How. Pr.*, 51.
2. Consequently the mortgagor may set up in defence a counter-claim to the effect that the plaintiff is justly indebted to him arising upon contract; and, therefore, he does not owe the plaintiff the sum claimed to be due by the bond and mortgage; to such counter-claim the plaintiff may reply, setting up an indebtedness arising upon promissory notes, and money lent and advanced, and the county court is bound to dispose of these issues, although it would have no original civil jurisdiction to entertain an action brought directly upon the claims involved therein. *Ib.*

NEW TRIAL, 2.

COUNTY JUDGE.

1. County judges, though not counsellors of the supreme court, may do whatever acts supreme court commissioners might perform prior to the Constitution of 1846. *Supreme Ct.*, 1865, *People v. Hurlbult*, 44 *Barb.*, 126.
2. A county judge is authorized to let a defendant to bail, though indicted for a crime not cognizable by the court of sessions of that county. [2 N. Y., 84.] *Ib.*

COURTS.

1. All courts, having jurisdiction to try offenses against the provisions of the act to regulate the sale of liquors in Metropolitan Police district, shall instruct and charge grand jurors to inquire into all such offenses, and to indict all offenders. 1 *Laws of 1866*, 1242, ch. 578, § 24.
2. Duty of, to act promptly in cases arising under Metropolitan Police act. 1 *Laws of 1866*, 144, ch. 72, § 32; 2 *Id.*, 1462, ch. 686.

CREDITOR'S ACTION.

3. Civil courts in the city of New York have jurisdiction of actions under Fire and Building laws. 2 *Laws of 1866*, 2029, ch. 873, § 35.
4. Employment of a stenographer for the supreme court circuit, and court of oyer and terminer, Kings county, authorized. 1 *Laws of 1866*, 923, ch. 422.
5. Employment of a stenographer for the county court and court of special sessions of Livingston county, authorized. 1 *Laws of 1866*, 981, ch. 437.

CONTEMPT, 3: DISTRICT COURT OF THE CITY OF NEW YORK: HABEAS CORPUS: JURISDICTION: MARINE COURT: SURROGATE'S COURT.

COURT OF APPEALS.

APPEAL, 29, 36.

COURTS-MARTIAL.

The restoration of peace after the war for the suppression of the rebellion, which was effected by the revocation of the proclamation suspending the *habeas corpus*, absolved all offences committed by the public enemy during the existence of the war, and a prisoner could not thereafter be lawfully arraigned before a military tribunal for the offence of being a spy, or for the offence of arson. *Supreme Ct., Chambers*, 1865, *Matter of Martin*, 45 *Barb.*, 142.

COURTS OF SPECIAL SESSIONS.

1. Jurisdiction given of offences under an act to prevent unlawful taking of oysters. 2 *Laws of 1866*, 1635, ch. 753, § 2.
2. Act increasing the powers and duties of courts of special sessions, except in the city and county of New York, and the city of Albany, in respect to certain offences. 1 *Laws of 1866*, 1018, ch. 467.
3. The court of special sessions of the peace in and for the city and county of New York, shall hereafter be held by the two police justices elected respectively in the second and sixth judicial districts of said city and county, and said justices shall exclusively possess and exercise all the powers heretofore possessed and exercised by the said court of special sessions, as the said court has been heretofore organized and held. The said police justices shall receive as compensation for the duties imposed upon them by this act, the sum of fifteen hundred dollars per annum. 1 *Laws of 1866*, 911, ch. 409; amending *Laws of 1865*, 1132, ch. 563.*

JUDGMENT, 3.

CREDITOR'S ACTION.

Where an attorney has in his hands, or in the hands of another, with notice of the rights of judgment creditors, property of judgment debtors, his clients, which he has acquired in his capacity as attorney, or in violation of his duties as such, a court of equity will, at the suit of judgment creditors, enforce the peculiar trust which the law raises upon each state of facts. *Supreme Ct.*, 1859, *Cowing v. Greene*, 45 *Barb.*, 589.

PARTIES, 17: PLEADING, 6, 7, 11, 12.

* The amendment relates only to the compensation.

CRIMINAL LAW.

1. When the legislature enacted that county judges, when not holding court, may do whatever acts judges of the court of common pleas, being of the degree of counsellors of the supreme court, and acting as supreme court commissioners, could do on the 12th of May, 1847, they conferred the power on county judges to let to bail persons charged with crime, whether indicted or not, in all cases where a justice of the supreme court can let to bail. *Supreme Ct.*, 1865, *People v. Hurlbult*, 44 *Barb.*, 126.
2. On a writ of error, it appeared that K. and M. were jointly indicted for a grand larceny; that K. pleaded guilty of an attempt to commit grand larceny, and was sentenced; and that M. was then put upon trial, and convicted of the grand larceny charged;—*Held*, that the conviction of M. was good. *Ct. of Appeals*, 1864, *Klein v. The People*, 31 *N. Y.*, 228.

ARREST, 9-13: INDICTMENT: SENTENCE: WARRANT.

DAMAGES.

1. In an action for breach of promise of marriage, it is not erroneous for the judge to charge the jury that if they find the defendant seduced the plaintiff under a promise of marriage, it aggravates the damages. *Ct. of Appeals*, 1864, *Kniffen v. McConnel*, 30 *N. Y.*, 285.
2. In an action against an agent for breach of duty in selling the property of the principal contrary to instructions, the measure of damages is to allow the plaintiff the highest market price of such property, prevailing between the time when the wrong was committed, and a reasonable time thereafter, within which to commence an action. *Ct. of Appeals*, 1864, *Scott v. Rogers*, 31 *N. Y.*, 676.
3. When a sheriff, who has arrested a defendant, becomes liable as bail for his appearance, by neglecting to put in sufficient bail, and an action is subsequently brought against the sheriff for not producing the body of the defendant on an execution against the person subsequently issued in the action, the sheriff is not allowed to show, even in mitigation of damages, that the execution debtor was insolvent. *Ct. of Appeals*, 1864, *Metcalf v. Stryker*, 31 *N. Y.*, 255.
4. In an action against the sheriff, as sheriff, for an escape, it is well settled that the insolvency of the debtor may be shown in mitigation of damages. [17 *Wend.*, 453; 1 *Johns.*, 215; 7 *Id.*, 189; 16 *Conn.*, 555; 10 *Mass.*, 470; 16 *Id.*, 294; 11 *Id.*, 89; 3 *Den.*, 327; 1 *Hill*, 275.] *Ib.*
5. But the rule is otherwise in an action founded on the statutory liability imposed by the Code upon the sheriff who neglects to require bail to justify after notice of exception. [9 *How. Pr.*, 188; 10 *Abb. Pr.*, 256; 1 *Bosw. & P.*, 456; 14 *East*, 499.] *Ib.*
6. In an action by the tenant for life, for damages to the estate, it is error to estimate the value of his estate by the present value of the rents and profits multiplied by the number of years' probable duration of his life without any deduction for annual charges, or rebate of interest for the time

allowed. *N. Y. Superior Ct., Sp. T., 1866, Greer v. The Mayor, &c., of New York, Ante, 206.*

CAUSE OF ACTION, 6: INJUNCTION, 14, 15.

DEEDS.

1. Where a municipal corporation, owning lands under water, in which the proprietors of adjacent upland had by law a pre-emptive right, granted the same to persons claiming to be such proprietors, by a deed which bound the grantees to pay an annual rent, with a right of distress and re-entry by the corporation, on default, and also bound the grantees to fill in and construct streets, &c., with a right of re-entry by the corporation, on default, with a further clause declaring that the deed and the estate granted were upon the condition, that if at any time thereafter it should appear, either that the grantees were not, at the date of the grant, proprietors of the upland, or if they should make any default in performance of their covenants, the grant should be absolutely null and void, and the grantors might re-enter, &c.;—*Held*, that this created not a precedent but a subsequent condition, as well as to the proprietorship of the uplands as respecting the performance of covenants; and upon its subsequently appearing that the grantees were not the true proprietors of the upland, their title was not divested so as to enable the true proprietor, on receiving a subsequent grant from the corporation, to recover the land from the first grantees, without the aid of any proceedings by the corporation or the State to annul the first grant. *N. Y. Superior Ct., 1863, Towle v. Palmer, Ante, 81.*
2. Notwithstanding the pre-emptive right, the corporation could make such first grant, subject to be divested by State action, and could not convey their right of entry for a breach of the condition. (*Bosworth, Ch. J., dissented.*) *Ib.*

DEFAULT.

INQUEST: JUSTICE'S COURT, 3.

DEFENCES.

1. Where the creditor and the principal debtor agree without the consent of the surety, for extension of time, the creditor is not allowed, in his subsequent action against the surety, to set up that the agreement for an extension was upon an usurious consideration, and was therefore void between the parties, and that, being void between them, it does not exonerate the surety. *Ct. of Appeals, 1865, Billington v. Wagoner, 33 N. Y., 31.*
2. The pendency of a suit *in rem*, in the United States court, against a vessel, for advances, is no defence to an action founded on the lien of the master of the vessel on the freight, unless the plaintiffs had such lien at the time of the commencement of the action *in rem*. *N. Y. Com. Pl., 1859, Sorley v. Brewer, 1 Daly, 79; affirming S. C., 18 How. Pr., 276, 509.*

CAUSE OF ACTION, 24: DISCHARGE, 2: FORMER ADJUDICATION: INSURANCE, 4: JUSTICE'S COURT, 15: USURY.

DISCHARGE.

DEMAND.

1. An attorney in fact, who collects a legacy, is bound to pay it over or remit it without demand; and no demand is necessary before commencing an action against him for money received. [4 Kern, 496.] *Supreme Ct.*, 1864, *Power v. Hathaway*, 43 *Barb.*, 214.
2. Under a bond given by the agent of an insurance company, conditioned to promptly account for, and pay over and deliver, all moneys, &c., which might come into his hands as such agent, no demand is necessary before suit. Such an agent is not a factor or an attorney within the rule requiring a demand before suit brought. He is bound to remit when the moneys are received, and the existence of any custom allowing time does not extend or enlarge the time differently from what the law made it, to the injury of the rights of the surety. *Supreme Ct.*, 1864, *Albany City Fire Insurance Company v. Devendorf*, 43 *Barb.*, 444.
3. A chattel mortgage which does not specify a time for payment is due immediately, and no demand for payment is necessary to sustain an action upon it. *N. Y. Com. Pl.*, 1865, *Dikeman v. Puckhafer*, *Ante*, 32.
4. In an action against sureties, demand before suit;—*Held*, unnecessary. *Fox v. Parker*, 44 *Barb.*, 341.

INDEMNITY: SUMMARY PROCEEDINGS, 4.

DEMURRER.

PARTIES, 18, 19: PLEADING, 28, 31.

DEPOSITION.

1. That a deposition cannot be excluded because the witness, in an answer, refers to a written contract, but the writing is not produced, where the interrogatories do not call for, or mention the contract. *Ct. of Appeals*, 1864, *Hooker v. Eagle Bank of Rochester*, 30 *N. Y.*, 83.
2. Where an original record referred to in an interrogatory is out of the jurisdiction and power of the courts, and the court has no power over it, so that it could not be annexed to the commission, and the court could not compel its production, a copy, proved to be such, is admissible. *Supreme Ct.*, 1865, *Black v. Camden & Amboy Railroad Company*, 45 *Barb.*, 40.

DISCHARGE.

1. The provision of 2 Rev. Stat., 38, § 19—relative to discharges, under certain provisions of the statutes relative to insolvents and imprisoned debtors,—amended by adding a provision that all the petitions, affidavits, schedules, inventories, orders, and other papers upon which any such discharge shall be hereafter granted, shall, within three months from the granting thereof, be filed and recorded by the clerk of the county in which the insolvent resided at the time of the presentation of his petition, or such discharge shall be thereafter inoperative, until such papers shall be duly filed and recorded as aforesaid. The record thereof, and a transcript of such record, duly authenticated, shall be presumptive evidence of the facts and proceedings therein contained. The clerk shall receive five cents per folio for record-

DISMISSAL OF COMPLAINT.

- ing said papers, and no other fee for filing the same. 1 *Laws of* 1866, 234, ch. 116.
2. An insolvent's discharge, granted under the laws of this State, is a good defence in an action on a judgment recovered here, in the absence of any evidence as to where the contract was made on which the judgment was recovered. Evidence that the creditor was a non-resident is not material. *N. Y. Superior Ct.*, 1863, *Soule v. Chase*, *Ante*, 48.
 3. After a defendant, arrested in a civil action, has been discharged from imprisonment under the statutes relative to insolvents, the plaintiffs can not, by merely changing the form of action to a suit for tort, instead of a suit on contract, procure the arrest of the defendant in another court, for the same cause, for the purpose of evading the force and effect of his discharge, and thereby defeating the clear intendment of the statute. *City Judge of N. Y.*, 1866, *People v. Kelly*, *Ante*, 432; to the same effect, *N. Y. Superior Ct.*, 1866, *Wright v. Ritterman*, *Ante*, 428.

EXECUTION, 7, 8.

DISCONTINUANCE.

In actions or proceedings pending on the 26th of April, 1866, if the defence depends on a deed by the treasurer and county judge, on a tax sale under the Laws of 1850, ch. 298, the party plaintiff therein may discontinue the same, without costs to the adverse party. 2 *Laws of* 1866, 1825, ch. 820, § 2.

DISCOVERY AND INSPECTION.

1. The provision of section 388 of the Code of Procedure—that the court before which an action is pending, or a judge or justice thereof, may in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers, and documents, in his possession or under his control, containing evidence relating to the merits of the action or the defence therein,—does not sanction an order requiring either party to disclose evidence which he intends to introduce against his adversary. *N. Y. Superior Ct.*, 1865, *Strong v. Strong*, *Ante*, 233.
2. In the affidavit or petition for a discovery of books and papers, a statement of the advice of counsel and belief of the deponent is not alone sufficient. *Ib.*

DISMISSAL OF COMPLAINT.

1. Where, after service of a summons and complaint, the defendant obtains an order staying the plaintiff's proceedings until former costs are paid, and the defendant has not paid the costs, and the stay remains in force, the defendant cannot move to dismiss the complaint for want of prosecution. *N. Y. Superior Ct.*, 1866, *Unger v. Forty-second street Railroad Company*, 30 *How. Pr.*, 443.
2. If it appear on the whole case at the close of the proof in an action for slander, in charging perjury in a former action, that the testimony charged to have been perjury was wholly immaterial, or that the part of it to which the charge of perjury related, if it related to part only, was immaterial,

DISTRICT COURTS.

the defendant is entitled to a dismissal of the complaint. *N. Y. Supreme Ct., Sp. T., 1866, Wilbur v. Ostrom, Ante, 275.*

3. In an action against the corporation of the city of New York, the defendants set up in their answer, as a distinct ground of defence, the fact that the complaint did not contain the allegation of a presentment of demand to the comptroller as required by the statute;—*Held*, that a motion on the trial to dismiss the complaint on the ground of such omission should have been granted, and that, having been denied, the objection was available on appeal. *N. Y. Com. Pl., 1863, Russell v. Mayor of New York, 1 Daly, 263.*
4. Where, in an action to enforce a mechanic's lien, the complaint fails in the requisite allegations to show a case under the statute, it is proper to dismiss the case at the trial. *N. Y. Com. Pl., 1859, Bailey v. Johnson, 1 Daly, 61.*

CAUSE OF ACTION, 10: COSTS, 7: MARINE COURT, 7, 9: NONSUIT: PLEADING, 32: TRIAL, 7: VARIANCE.

DISTRICT ATTORNEY.

1. Of the powers of district attorneys in controlling prosecutions. *The People v. Strong, Ante, 244.*
2. Duty of, to act promptly in cases arising under Metropolitan Police act. 1 *Laws of 1866, 144, ch. 72, § 32.*
3. District attorney of Albany may appoint an assistant. 2 *Laws of 1866, 1574, ch. 734.*

DISTRICT COURTS OF THE CITY OF NEW YORK.

1. Terms of office of the justice and clerk of the district court for the Eighth Judicial District in the city of New York, extended. Selection of their successors provided for. 1 *Laws of 1866, 471, ch. 217.*
2. In an action for injuries arising from the defendant's negligence in not repairing a pier in his possession, though some evidence be given to show that he has parted with the title to the pier, the question of title is not to be regarded as raised, so as to have the effect of ousting the district or justice's court of its jurisdiction. *N. Y. Com. Pl., 1865, Cannavan v. Conklin, Ante, 271.*
3. The statute is imperative, that when it appears upon the trial, in a district court, that the plaintiff is not a resident, and has filed no security, the complaint must be dismissed. [7 Abb. Pr., 421.] *N. Y. Com. Pl., 1860, Dean v. Cannon, 1 Daly, 34.*
4. And it does not alter the rule, that the fact of non-residence and failure to file security, appear, for the first time, upon a new trial, ordered by the appellate court. *Ib.*
5. An appeal from a district court of the city of New York, is to be taken to the General Term of the Court of Common Pleas in that city; and the provision of the Act of 1862, authorizing a new trial in the county court of cases tried in the justice's court, does not apply to the courts in the city of New York. *N. Y. Com. Pleas., 1863, McIlhenny v. Wasson, 1 Daly, 285.*

ERROR (WRIT OF).

6. It is not necessary that the undertaking given upon obtaining a stay of execution under section 356 of the Code, should embrace the undertaking required by section 354 to perfect an appeal from a district court. *N. Y. Com. Pl.*, 1860, *Sperling v. Levy*, 1 *Daly*, 95.

EJECTMENT.

The provision of 2 Rev. Stat., 307, § 29,—which requires that “when the action is against several defendants, if it appear on the trial that any of them occupy distinct parcels in severalty, or jointly, and that other defendants occupy distinct parcels in severalty or jointly, the plaintiff shall elect against which he shall proceed; which election shall be made before the testimony in the cause shall be deemed closed; and a verdict shall be rendered for the defendants not so proceeded against,”—is not repealed by the Code of Procedure. It relates to the subject-matter of the action, and is retained in force by section 455 of the Code. *Supreme Ct.*, 1865, *Dillaye v. Wilson*, 43 *Barb.*, 261.

ELECTION OF REMEDIES.

1. Where the gist of the transaction is a tort, if it arises out of a contract, the plaintiff may declare in tort or contract, at his election; but, having made his election, he is bound by it. *City Judge of N. Y.*, 1866, *People v. Kelly*, *Ante*, 432.
2. Where the creditor holds the bill or note of his debtor only, he is not bound, upon suing on the original demand, to give up the note before the commencement of the action. That is only required when the suit proceeds on the basis of a rescission of the contract. While the debtor's note remains in the hands of the original creditor, it merely suspends the remedy on the original demand until its maturity; and then the creditor has his election to sue upon the note, or upon the original indebtedness. And when he sues upon the original demand, it is sufficient for him to produce and surrender the note upon the trial. *Supreme Ct.*, 1864, *Armstrong v. Cushney*, 43 *Barb.*, 340.

PLEADING, 9.

ERROR, (WRIT OF.)

1. On a writ of error in a criminal case, the default of the defendant in the supreme court does not entitle the district attorney to a reversal of the proceedings in the court of sessions, as a matter of course. It is the duty of the court to determine the case upon the writ of error, and the return thereto, in the same manner it would if the defendant had appeared and argued the case in person or by counsel. *Supreme Ct.*, 1866, *People v. Tarbox*, 30 *How. Pr.*, 318.
2. It is essential to constitute a record that the judge of the court should sign it; and without such signature it is not record; and a writ of error brought to reverse it, should be dismissed for want of any record upon

EVIDENCE.

which the court can act; *—*So held*, where the alleged record was signed by the district attorney instead of the judge. *Ct. of Appeals*, 1865, *Weed v. People*, 31 N. Y., 465.

3. Admission of irrelevant testimony not error, if it is afterward made pertinent by other testimony. *Supreme Ct.*, 1865, *Black v. Camden & Amboy Railroad Company*, 45 *Barb.*, 40.

CRIMINAL LAW, 2.

ESTOPPEL.

A prior incumbrancer of premises covered by a mortgage,—*Held*, not estoppel, in a peculiar case, by the record of the foreclosure proceedings; nor by permitting a sale to take place without interposing objection. *Frost v. Koon*, 30 N. Y., 428.

EVIDENCE.

1. Judicial Notice : Presumptions.

1. That the rule that courts may take judicial notice of whatever ought to be generally known, within the limits of their jurisdiction, includes notice of the great lines of public travel and transportation of property, and their connection with each other, and the general course of trade and transportation through the country. *Supreme Ct.*, 1864, *Smith v. New York Central R. R. Co.*, 43 *Barb.*, 225.
2. In any suit under the provisions of the Metropolitan Sanitary Act, the right of the Health Board, or the Board of Police, to make any order, or cause the execution thereof, shall be presumed. 1 *Laws of 1865*, 128, ch. 72, § 14, subd. 2.
3. A license to enter premises, upon which one has for years been in the habit of visiting, may be presumed. *Supreme Ct.*, 1865, *Martin v. Houghton*, *Ante*, 339.
4. Evidence as to the length of time a path had existed which was used for so entering is pertinent. *Supreme Ct.*, 1865, *Martin v. Houghton*, *Ante*, 339.
5. It will be presumed that the requisite undertaking was given by the creditor on issuing an attachment against a vessel, especially where the warrant recites that this was done. *N. Y. Superior Ct.*, 1866, *Delaney v. Brett*, *Ante*, 421.
6. In order to warrant a conviction of a licensed tavern-keeper, under the act of 1857, ch. 628, for selling liquors at his bar, on Sunday, proof must be made of an *intent*, on the part of the defendant, to violate the statute. Where sale is not made by the defendant personally, or in his presence, the presumption of his innocence is not overcome by merely showing that the sale was made on his premises, by his bar-tender, unless the evidence also shows that the defendant in some manner participated in it, connived

* The case is obscurely reported, but the above appears to have been one of the points decided.

EVIDENCE

- at it, or assented to it. *Supreme Ct.*, 1865, *The People v. Utter*, 44 *Barb.*, 170.
7. The question whether he assented, is one of fact, and not of legal presumption, and it belongs to the jury. *Ib.*
 8. Where an infant has purchased real estate, and continued in possession, and exercised rights of ownership after becoming of full age, he will be deemed thereby to have ratified the contract of purchase, and may be held liable, upon his promissory note given while under age, for the purchase money. *Ct. of Appeals*, 1865, *Henry v. Root*, 33 *N. Y.*, 526.
 9. It is not necessary that an express promise to pay, made after defendant became of age, should be shown. [Reviewing many cases.] *Ib.*
 10. Where it was the duty of an officer making a judicial sale of land to sell in parcels, the presumption is that he did so. *Ct. of Appeals*, 1865, *Leland v. Cameron*, 31 *N. Y.*, 115.
 11. In an action by the true owner of the adjacent lands, to recover lands under water, to which he had a preemptive right, but which have been granted to other persons, who claimed to be owners of the adjacent lands, evidence of his recovery of the adjacent lands against strangers is not irrelevant, he being required to establish his title independently of such recovery. *N. Y. Superior Ct.*, 1863, *Towle v. Palmer*, *Ante*, 81.
 12. That possession of real property is to be presumed lawful. *Ct. of Appeals*, 1864, *Brown v. Bowen*, 30 *N. Y.*, 519.
 13. Production by the plaintiff of a promissory note bearing the indorsement of the payee;—*Held*, sufficient presumptive evidence to sustain allegations of a gift of the note to the plaintiff. *Ct. of Appeals*, 1865, *Bedell v. Carll*, 33 *N. Y.*, 581.
 14. The possession of a promissory note by the plaintiff, indorsed in blank by the payee thereof, is *prima facie* proof of ownership, and sufficient, in the absence of other evidence, to entitle the holder to recover on proving the indorsement, &c.; allegations in the complaint as to how the holder acquired title thereto from the payee are unnecessary, and need not be proved. *Ct. of Appeals*, 1865, *Bedell v. Carll*, 33 *N. Y.*, 581.
 15. When a recognizance had upon it this indorsement: "Filed, February 25th, 1863," not signed by any one;—*Held*, that the presumption was, that the paper was filed in the office of the clerk of the county where the prisoner was let to bail. *Supreme Ct.*, 1865, *The People v. Hurlbult*, 44 *Barb.*, 126.
 16. All the parts of a connected correspondence, having relation to the same subject, may undoubtedly become evidence, where one part is introduced; but it is not to be assumed that friendly letters between intimate connections form a series, nor is there any presumption that the subject of such successive letters is the same. *N. Y. Superior Ct.*, 1865, *Strong v. Strong*, *Ante*, 233.
2. Burden of Proof.
17. Upon an application to charge an assignee of a demand in suit, who is not a party to the suit, with the costs, the moving party holds the affirmative, and is bound to establish the necessary facts by satisfactory evidence. *Ct. of Appeals*, 1865, *Wolcott v. Holcombe*, 31 *N. Y.*, 125.

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18. Where property is delivered to a railroad company, to be transported by that and another company over their respective roads, to its place of destination, it is enough for the owner, in an action against the company delivering the property, to recover damages for negligence, to show that he delivered the property to the first company in good order; and the burden is then cast upon the company delivering the goods thus injured, of proving that they were not injured while in its possession, or that they came into its possession thus injured. It is true that the owner must give sufficient evidence to show that the goods were in a good condition when they came to the possession of the defendant, as a part of the evidence that they have been injured while in his custody; but this may be shown by proof of facts, and circumstances from which the presumption of fact arises that the goods were in a proper condition when the carrier received them. *Supreme Ct.*, 1864, *Smith v. New York Central Railroad Company*, 43 *Barb.*, 225

19. The general rule is, that things once proved to have existed in a particular state, are to be presumed to have continued in that state until the contrary is established by evidence either direct or presumptive. [Best. on Presumptions, § 136; 4 *Den.*, 431; 9 *Barb.*, 271; 22 *Id.*, 516.] This rule is to be applied to the question of the condition of the goods delivered, to be transported over several connecting railroads; otherwise there would be no safety to the owner. It would often be impossible for him to prove at what point or in the hands of which company, the injury happened. But give to such party the benefit of the presumption that the goods he delivered in good order in such case, continued so until they came to the possession of the company which delivers them at the place of destination in a damaged condition, and his rights will be completely protected. *Supreme Ct.*, 1864, *Smith v. New York Central Railroad Company*, 43 *Barb.*, 225.

3. Best and Secondary Evidence.

20. It was shown that search had been made in the clerk's office for an execution, and none could be found; that the person then sheriff had had his house burned—removed, and died, and that on inquiry of the members of the family, it could not be found;—*Held*, that this was sufficient evidence of loss to admit secondary evidence of the contents of the execution. But it was necessary to show that an execution was issued to the sheriff. *Ct. of Appeals*, 1865, *Leland v. Cameron*, 31 *N. Y.*, 115.

21. The proof of the loss of papers, to admit secondary evidence of their contents, is a preliminary matter addressed to the court exclusively, and its sufficiency is to be passed on by the court, in view of the peculiar features of each case. *Supreme Ct.*, 1865, *Graham v. Chrystal*, *Ante*, 121.

4. Opinions of Witnesses.

22. A witness cannot be asked whether he would have endorsed a note if he had not had certain security. Such a question calls for the operation of the mind of the witness, and not for facts. *Ct. of Appeals*, 1865, *Newell v. Doty*, 33 *N. Y.*, 83, 94.

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23. Opinions of witnesses may be received as to the value of chattels, and a witness who has been in this country five years may be allowed to testify as to the value of the contents of a trunk, from knowledge acquired since he came to this country, and to prove that he has made inquiries here as to the value of articles of that kind. *Ct. of Appeals*, 1864, *Merrill v. Grinnell*, 30 N. Y., 594.
24. In an action to recover damages for personal injuries, medical men may be called as witnesses to express their opinions as to the permanency of the injury. *Ct. of Appeals*, 1865, *Buell v. New York Central Railroad Company*, 31 N. Y., 314.
25. In an action for a breach of warranty of cattle, it is not competent for a witness, not an expert, to state that the cattle were of a disorderly character. *Supreme Ct.*, 1864, *Strevel v. Hempstead*, 44 *Barb.*, 518.
26. It is not competent for a witness to testify that in his opinion crops were "damaged one hundred dollars." He should be confined to stating the quantity of hops, oats, buckwheat, &c., the fields would have produced, if the defendant's cattle had not trespassed upon them, and how much less each field would produce in consequence of the injury done them by the cattle of the defendant; and might have followed up such statements with other facts, until his final conclusions would approximately show the amount of damages the plaintiff had sustained; and it would also be proper for the witness to state the market value of the crops if they had not been injured. [Citing many cases.] *Supreme Ct.*, 1865, *Armstrong v. Smith*, 44 *Barb.*, 120.
27. In an action for malicious prosecution in instituting a complaint for perjury against the plaintiff, the defendant may be asked as a witness in his own behalf, whether he believed that the testimony of the plaintiff, charged to be perjury, was material to the proceeding in which it was given; and whether, when he made the charge, he believed that the plaintiff had been guilty of the offence. His answer, if in the affirmative, would tend directly to disprove malice, and perhaps to show probable cause. How much weight the jury would give to such testimony from the defendant himself, is a question exclusively for them. But the testimony is not incompetent. [14 N. Y. (4 Kern.), 567; 21 N. Y., 121; 25 N. Y., 530, 439.] *Ct. of Appeals*, 1864, *McKown v. Hunter*, 30 N. Y., 625.
28. What questions may be put to an expert, relative to indications observed in the handwriting of a promissory note and signature, bearing upon the question of the genuineness of the note. *Dubois v. Baker*, 30 N. Y., 354; affirming S. C., 40 *Barb.*, 556.

5. Parol Evidence to Vary a Writing.

29. The rule that parol evidence is not admissible to vary a written agreement applied in a peculiar case. *Halliday v. Hart*, 30 N. Y., 474.
30. An order for the payment of money, in the hands of the payee, or his assignee, is evidence in writing of his title to the payment, which cannot be varied or contradicted by parol evidence. *Ct. of Appeals*, 1865, *Parker v. The City of Syracuse*, 31 N. Y., 376.

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31. But it is competent for parties, after such order has been delivered or assigned, to waive rights that have been acquired thereby, or to modify them: which waiver or modification may be proved *dehors* the order itself. *Ib.*
32. In an action against the sureties of a person selling paper on commission for the plaintiff;—*Held*, that evidence of a *usage* or *custom* existing among men engaged in that business, to give notes to the manufacturer, before the paper is sold, to enable him to raise money thereon in anticipation of the sales, was proper: and was not liable to the objection that the effect of it was to vary the terms of the written contract. That it went to explain and ascertain the intention of the parties in relation to a matter upon which the contract was silent. *Supreme Ct.*, 1865, *Fox v. Parker*, 44 *Barb.*, 541.
33. That an oral agreement connected with a contract in writing, if subsequent and independent, and founded on a new consideration, may be proved by parol. It is not regarded as merged in the writing. *Ct. of Appeals*, 1865, *Stockwell v. Holmes*, 33 *N. Y.*, 53.
34. Parol evidence is admissible to show that some of the subscriptions appearing upon a subscription-paper were made upon confidential conditions, and were therefore fraudulent as against other subscriptions. *Ct. of Appeals*, 1864, *New York Exchange Company v. De Wolf*, 31 *N. Y.*, 273.
35. Where one subscribes a sum towards raising a larger sum, as a fund for specified purposes, his engagement does not become operative until additional sums are subscribed. And parol evidence is admissible to show the purposes of the fund, and in a general way, the amount needed, and the parties expected to contribute. *Ct. of Appeals*, 1864, *Dodge v. Gardiner*, 31 *N. Y.*, 239.
36. Parol declarations by a testator at the time of making a will, are not competent evidence that he intended by the will to execute a power of appointment vested in him. A will must be wholly in writing, and cannot be added to or explained by any parol communications. *Ct. of Appeals*, 1865, *White v. Hicks*, 33 *N. Y.*, 383; affirming *S. C.*, 43 *Barb.*, 64.
37. But the court may compare the dispositions made by the will with the property owned by the testator at the time, and may deduce from the facts an intention to dispose of the subject of the power. And this may be done notwithstanding the property in question is personal. *Ib.*
38. The English decisions holding that the amount of the testator's property at the time of making the will cannot be inquired into for the purpose of deducing the intention to execute a power [2 *Br. Ch.*, 297; 2 *Ves.*, 589; 3 *Id.*, 299; 7 *Id.*, 391; 2 *Mer.*, 533; 1 *Swans.*, 65; 1 *Jac. & W.*, 352; 3 *Sim.*, 275; 5 *Id.*, 508; 1 *Keen*, 753; 7 *Mylne & K.*, 666; 3 *De Gex & S.*, 347; 13 *Gur.*, 384; 1 *Atk.*, 558; *Id.*, 559; and see 1 *Hare*, 377; 8 *Eng. L. & Eq.*, 157],—are not to be followed in this State; more especially as the rule has been abrogated by act of Parliament. [7 *Will. IV.*, and 1 *Vic.*, 126, 27.] *Ib.*

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6. *Hearsay: Res Gestæ.*

39. After a witness has stated what he has seen and heard, which tended to establish the existence of a copartnership, relied on as rendering one of the defendants liable, it is competent to prove by him, negatively, that he had no knowledge or information to the contrary. The object of the testimony being to prove that the plaintiffs relied upon what they had heard as to the acts of the defendants, it materially strengthens that evidence by showing that nothing different had come to their knowledge. *Supreme Ct.* 1864, *Conklin v. Barton*, 43 *Barb.*, 435.
40. Conversations held admissible, under peculiar circumstances, as part of the *res gestæ*. *Fox v. Parker*, 44 *Barb.*, 541.

7. *Admissions and Declarations.*

41. Application of the rule that the admissions of a former holder of a chose in action are inadmissible against his assignee; such admission being deemed hearsay evidence. *Ely v. McNight*, 30 *How. Pr.*, 97.
42. In the absence of proof of the effect of the admission on the party setting up an estoppel, it is for the jury to say whether, on the facts, the several essential parts of the estoppel are proved. *Ct. of Appeals*, 1864, *Brown v. Bowen*, 30 *N. Y.*, 519.
43. The answer of an executrix, admitting receipt of money, and its distribution among the next of kin and legatees;—*Held*, admissible, and binding upon defendants who were made parties after her death by bill of revivor and supplement. *Ct. of Appeals*, 1865, *Green v. Givan*, 33 *N. Y.*, 343.
44. The plaintiff having made a proposition to the defendant to do certain work and labor upon a building which the latter was erecting, the defendant told him to go and see B., the contractor, about it. He did so, and B. employed him to do the work. There being some evidence to show B.'s agency for the defendant;—*Held*, that proof of declarations made by B. in making the contract with the plaintiff was admissible evidence against the defendant, the declarations being those of an agent relating to the subject-matter of his agency. *Supreme Ct.*, 1865, *Fleming v. Smith*, 44 *Barb.*, 554.

8. *Documentary Evidence.*

45. The entry of the plaintiff's attorney, in his register, of the issuing of execution, is competent evidence, where the attorney is dead, that it was issued. In general, all entries or memoranda made in the course of business or duty, by any one who would at the time have been a competent witness of the fact which he registers, are competent evidence after his decease. Entries of an attorney in his register are within the rule, and the court will presume that the execution was in the form and contained the directions which the law at the time required. *Ct. of Appeals*, 1865, *Leland v. Cameron*, 31 *N. Y.*, 115.
46. The minutes of testimony taken by a justice on the trial before him, may be read in evidence to determine whether the scope of the issue being

- tried before him was changed by the evidence, for the purpose of determining the subject-matter of litigation. *Ct. of Appeals*, 1865, *Thurst v. West*, 31 N. Y., 210.
47. A recognizance filed in the proper clerk's office becomes a record [5 Barb., 360 ; 4 Den., 530 ; 4 Park. Cr., 45], the statements of which cannot be contradicted by parties thereto. [16 Johns., 55.] *Supreme Ct.*, 1865, *The People v. Hurlbult*, 44 Barb., 126.
48. Where a discharge recites all the required jurisdictional facts and proceedings, the county clerk's certificate that certain papers, technically insufficient to show jurisdiction, are all that have been filed with him in the proceeding, is not, of itself, sufficient to disprove the recitals. *N. Y. Superior Ct.*, 1863, *Soule v. Chase*, *Ante*, 48.
49. Copies of the proceedings of the Metropolitan Sanitary Board, of its rules, regulations, by-laws, and books and papers constituting part of its archives, when authenticated by its secretary, or secretary *pro tem.*, shall be presumptive evidence, and the authentication be taken as presumptively correct, in any court of justice or judicial proceeding, when they may be relevant to the point or matter in controversy, of the facts, statements and recitals therein contained, and the actions, proceedings, authority and orders of said board shall at all times be regarded as in their nature judicial, and be treated as *prima facie* just and legal. 1 *Laws of 1866*, 143, ch. 72, § 31.
50. That the form of the invoice sent with the goods forwarded to a person carrying on a business as a commission merchant, is not conclusive evidence on the question whether the goods were sold, or were sent for sale on commission. *Ct. of Appeals*, 1865, *Beebe v. Mead*, 33 N. Y., 587.
51. After a defendant has availed himself of the plaintiff's books of account, to establish certain credits in his favor, it is competent for the plaintiff to read from the same books charges and entries which show that those credits have been exhausted by counter-charges of debit, made at about the same time and afterwards. The defendant cannot use the books to establish credits in his favor, and at the same time deny to the plaintiff the full benefit of the charges therein against him. He must take the whole or none. *Ct. of Appeals*, 1864, *Dewey v. Hotchkiss*, 30 N. Y., 497.
52. The fact that the entries, or some of them, are in the handwriting of the plaintiffs, makes no difference. *Ib.*
53. Depositions of third persons taken in a previous action, to which the plaintiff was not a party ;—*Held*, inadmissible to contradict the plaintiff's testimony in the present action. *Ct. of Appeals*, 1865, *Hubbard v. Briggs*, 31 N. Y., 518, 536.
54. A contractor failed to complete his contract, and the owner was compelled to complete the building. In an action by a sub-contractor against the owner for work and materials, for which a lien had been filed ;—*Held*, that the defendant might prove on the trial what it had actually cost him to complete the building, for the purpose of showing that nothing was due to the contractor, and, consequently, nothing due to the plaintiff, as sub-contractor. *N. Y. Com. Pl.*, 1860, *Smith v. Ferris*, 1 *Daly*, 19.
55. The record of a dismissal of the complaint between the same parties in another court, for the purpose of proving a former adjudication, is inadmissible in evidence, unless it is shown that such dismissal was a judicial

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determination of the same point in controversy here. [3 East, 346.] *N. Y. Com. Pl.*, 1860, *Smith v. Ferris*, 1 *Daly*, 18.

56. To entitle a written contract between one of the parties and a third person to be admitted in evidence, its pertinency must be first shown. *N. Y. Com. Pl.*, 1860, *Smith v. Ferris*, 1 *Daly*, 18.
57. The answer of a witness that the consideration of a sale of chattels was a sum of money and a lot of land, is not open to objection on the ground that it gives the contents of a deed of land not produced on the trial. *N. Y. Com. Pl.*, 1863, *Reynolds v. Kelly*, 1 *Daly*, 283.

9. *Rules Relative to Particular Facts and Issues.*

58. In an action upon a promissory note, held by the plaintiffs as collateral security, where the defendant sets up in his answer the defence of payment, he may give in evidence any facts which, in law, amount to a satisfaction of the note, as against such plaintiffs. *Ct. of Appeals*, 1865, *Farmers' and Citizens' Bank v. Sherman*, 33 *N. Y.*, 69.
59. Where such a note, held as collateral security by the plaintiffs, had been paid to the plaintiffs by the payee thereof, by the delivery of lumber of sufficient value to satisfy the same, which lumber was delivered to, and accepted by the plaintiffs, in pursuance of an agreement that the payee might withdraw any of the collaterals held by the plaintiffs to the amount of lumber delivered to them, and he designated such note to be withdrawn; —*Held*,
1. That under the plea of payment, the defendant might give evidence of such agreement, and the transactions under it, and that, when proved, the plea of payment was sustained.
 2. That the note having been given for the accommodation of the payee, that such agreement, and the transactions under the same, amounted to a payment of the note as between the maker and the payee of the same. *Ct. of Appeals*, 1865, *Farmers' and Citizens' Bank v. Sherman*, 33 *N. Y.*, 69.
60. In an action by the receiver of a mutual insurance company upon a premium note, it is incumbent upon the plaintiff to give some evidence of the occurrence of losses which rendered the assessment proper. He is not obliged, however, to prove the fires by which the losses were sustained; but in general, any evidence of loss which would have concluded the company while it was engaged in business,—*e. g.*, proof of the settlement and allowance of the loss; of a judgment recovered upon it, &c.,—will be sufficient. *Ct. of Appeals*, 1865, *Jackson v. Roberts*, 31 *N. Y.*, 304.
61. In such an action, a record of losses for which the assessment was made, showing the amount of insurance in each instance, and the sum at which the loss was adjusted, either by the company or the receiver, was produced and proved by a witness who was clerk of the company during the whole period the defendant's policy was in force, and down to the time of the company's dissolution, and who was afterwards the receiver's clerk. This witness stated that of his own knowledge the record was made from claims for losses by fire and otherwise, against the company, some of which claims were allowed by the company, and the others by the receiver; that it con-

- tained a list of losses in the company, and the date of loss, the number of policy, the names and residences of the insured, the amount insured, and amount paid, or adjusted to be paid thereon, by the company or the receiver; that the assessment of the defendant's note was made to pay the losses which accrued within that period; that the defendant's policy was in force; that he could not specify the particular losses, but that the same appeared in the record of losses, which he identified, and annexed to his deposition. By reference to the paper, it was seen that losses accrued and were allowed for the time the defendant's policy was in force, to over the sum of eight thousand dollars;—*Held*, that this was ample proof. *Ct. of Appeals*, 1865, *Jackson v. Roberts*, 31 N. Y., 304.
62. A depositor;—*Held*, not concluded by entries made by the bank in his deposit-book upon writing up his account, where it appeared that objection was made within a reasonable afterwards. *N. Y. Com. Pl.*, 1865, *Schneider v. The Irving Bank*, 1 *Daly*, 500; *S. C.*, 30 *How. Pr.*, 190.
63. In an action for breach of promise of marriage, evidence of the defendant's wealth is admissible, as going to show what would have been the plaintiff's station in society if the promise had not been broken. But such evidence should be confined to the general reputation of the defendant as to property. *Ct. of Appeals*, 1864, *Kniffen v. McConnell*, 30 N. Y., 285.
64. In an action for breach of promise of marriage, where the plaintiff proved :—1st. A promise, as admitted by the defendant in his acts and conversation; 2d. The pregnancy of the plaintiff, and subsequent birth of a child; 3d. An application to the defendant to marry her, on account of her condition, and his refusal; 4th. The appeal of the plaintiff that she did not want his money, but wanted his word and honor that he promised her;—*Held*, that this evidence was amply sufficient to submit to the jury the question whether the defendant had seduced the plaintiff, and if so, whether he had promised marriage, to carry out his intentions, or had taken advantage of the confidence arising from that promise, to effect his purpose. *Ct. of Appeals*, 1864, *Kniffen v. McConnell*, 30 N. Y., 285.
65. Where it was proved, in an action to recover damages for breach of promise of marriage, that the uncle and aunt of the plaintiff, in her presence, and without objection on her part, asked the defendant to marry her, which he refused, and when the plaintiff said to the defendant: "M., I don't want your money; I want your word and honor that you promised me," he replied: "There is no use in talking; I can't marry you now;"—*Held*, that there was evidence enough, on the subject of a request, to submit that question to the jury. *Ct. of Appeals*, 1864, *Kniffen v. McConnell*, 30 N. Y., 285.
66. In an action for breach of promise of marriage where the answer contains only a denial of the promise, evidence showing acts of improper and lewd conduct on the part of the plaintiff, for the purpose of proving criminal intercourse with other men, after the making of the promise, is not admissible as a bar to the action, for the reason that the defense is not set up in the answer. But such evidence may be received in mitigation of damages. *Ct. of Appeals*, 1864, *Kniffen v. McConnell*, 30 N. Y., 285.

71. Where the holder of a chattel mortgage pledged it for payment of a certain sum, and subsequently assigned it;—*Held*, that in the assignee's action against third persons for converting the goods mortgaged, evidence of such pledge was admissible as bearing on the question of damages. *N. Y. Superior Ct.*, 1863, *Haskins v. Kelly*, *Ante*, 63.
72. Evidence of conversations between the parties to a contract, prior to its completion, however admissible to construe terms used in it, is not otherwise admissible for the purpose of determining the intention of such parties. *Ct. of Appeals*, 1863, *Pollen v. Le Roy*, 30 *N. Y.*, 549; affirming *S. C.*, 10 *Bosw.*, 38.
73. Thus where, in an action on a sale of goods made through a broker, a witness who negotiated the purchase, was asked: "What conversation passed on the subject of this sale, prior to the actual delivery to these respective parties of the sale note?"—*Held*, that this was properly excluded. The sale was concluded by a bought and sold note in writing, containing all the elements of a contract; the names of parties, price, description of the article, time of delivery, and time of payment. It was not competent to vary this by evidence of what passed in the previous negotiations, the only issue being the contract and its performance, as to the specific article sold and tendered. *Ib.*
74. In an action by the receiver of an insolvent bank to recover the amount of defendant's subscription to the capital stock of the bank, evidence that the defendant united with other persons in signing and acknowledging a certificate of incorporation, in which, among other things, is stated the par value of the proposed shares, and the number of shares taken by defendant, is sufficient to charge the defendant as a subscriber. It is not necessary that the subscription-paper should contain an express promise to take or pay for the shares. [2 *N. Y.* (2 *Comst.*), 330; 16 *N. Y.*, 451; *Id.*, 457; 12 *Cow.*, 500; 10 *Barb.*, 260.] *Ct. of Appeals*, 1865, *Dayton v. Borst*, 31 *N. Y.*, 435.
75. In an action upon a warranty of a horse, given by the defendant on selling the horse, after the warranty has been proved, evidence of any statements previously made by a former owner of the horse to the defendant, leading him to suppose his warranty true, is immaterial. It is no answer to a claim upon a warranty, that the defendants made it under misinformation or in good faith. *Ct. of Appeals*, 1865, *Brisbane v. Parsons*, 33 *N. Y.*, 332.
76. Letters by a creditor to his debtor in a peculiar case;—*Held*, not sufficient evidence to establish that land sold under the judgment, and bid in by the creditor, was taken as security only. *Leland v. Cameron*, 31 *N. Y.*, 115.
77. Where the master of a vessel conveying a cargo of hides, found the cargo, at an intermediate port, to be in a bad and perishing condition, summoned three respectable men, dealers in, and shippers of hides, to examine the cargo, and declare what it was proper for him to do, under the circumstances, and they advised a sale, and the hides were sold accordingly;—*Held*, that although this advice was not conclusive, yet that it

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- should be taken into consideration by the jury in determining the question as to the necessity of a sale, and was entitled to very considerable weight. *Ct. of Appeals*, 1864, *Butler v. Murray*, 30 N. Y., 88.
78. What is sufficient evidence of the quality of goods sold,—e. g., butter,—in an action for the price, defended on the ground of defective quality. *Travis v. Jenkins*, 30 *How. Pr.*, 152.
79. To entitle persons who have received goods as factors, for sale upon commission, to hold the property as against the consignor, it is essential to establish one of two propositions; first, that they had made advances specially upon the credit of this shipment; or, second, that they were entitled, by their arrangement with the consignor, to a lien for any balance of advances, personally. *Ct. of Appeals*, 1865, *Beebee v. Mead*, 33 N. Y., 587.
80. To entitle a party to a decree of a court of equity, reforming a written instrument, he must show a plain mistake; and this must be clearly made out by satisfactory proofs. He must also show that the part omitted or inserted in the instrument, was omitted or inserted contrary to the intent of both parties, and under a mutual mistake. *Ct. of Appeals*, 1865, *Nevius v. Dunlap*, 33 N. Y., 676.
81. To rescind a sale of bank stock, and recover back the price, on the ground of false representations made by the seller, to induce the buyer to purchase, a petition by stockholders of the bank, praying for a re-establishment after a receiver had been ordered, and stating its financial condition, to which petition the defendant was not a party, is not competent against the defendant to show the falsity of his representations. *Ct. of Appeals*, 1864; *Lefever v. Lefever*, 30 N. Y., 27.
82. To constitute a surrender of the lease, it is necessary that the mutual agreement between lessor and lessee that the lease shall terminate, should be shown. But this agreement may be implied from circumstances. *Ct. of Appeals*, 1864, *Bedford v. Terhune*, 30 N. Y., 453.
83. What evidence is sufficient to show a surrender,—considered. *Ib.*
84. Evidence that plaintiff was a passenger on defendants' vessel in a peculiar case,—*Held*, sufficient. *Merrill v. Grinnell*, 30 N. Y., 594.
85. In an action for services of an architect in drawing up building plans for a corporation, if it appears that the plans were delivered to the corporation, the bringing of the suit is sufficient notice to produce them. *Ct. of Appeals*, 1864, *Hooker v. Eagle Bank of Rochester*, 30 N. Y., 83.
86. A married woman conveyed real property owned by her in her own right, receiving bonds and mortgages in part payment for the consideration, and afterwards assigned the bonds and mortgages by an instrument containing a covenant of guaranty by herself and her husband, that the money secured by them was collectible. In an action upon the covenant against husband and wife;—*Held*, that to enable the plaintiffs to charge the separate estate of the wife with the balance unpaid, he was bound to show either that an intention to charge the estate was expressed in the contract of sale and guaranty [22 N. Y., 450], or that the consideration obtained upon the sale was applied for the benefit of her separate estate. *Ct. of Appeals*, 1865, *White v. McNett*, 33 N. Y., 371.

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87. That a custom which is inconsistent with the express terms of a contract cannot be proved to affect the rights of parties under it. *Supreme Ct., Sp. T., 1864, Lombardo v. Case, 45 Barb., 95; S. C., 30 How. Pr., 117.*
88. It is sometimes proper to prove *usage*, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of the contracts not arising, from express stipulation, but from mere implications and presumptions, and acts of a doubtful character. It is not necessary that it should have existed immemorially, and it is sufficient if it be established, known, certain, uniform, reasonable, and not contrary to law. [2 Greenl. Ev., § 251; 4 Hill, 107; Cowen and Hill's Notes to Phil. Ev., 1408-1420.] *Supreme Ct., 1865, Fox v. Parker, 44 Barb., 541.*
89. In an action by a bank, as indorser of a note given to an insurance company, the bank, to show its title to the note, may give evidence of a uniform practice by the insurance company, for a period of several months prior to the transfer of the note in suit, of raising money upon its notes, upon the indorsement of its president for the purpose of passing title, and such evidence will warrant the jury in finding that the indorsement of the note in suit was upon sufficient authority to make it binding in favor of plaintiffs. [14 N. Y., 634; 16 N. Y., 125; 23 How. U. S., 345; 34 Eng. L. & Eq., 131; 13 N. Y., 318; 30 N. Y., 218.] *Ct. of Appeals, 1865, Marine Bank v. Clements, 31 N. Y., 33.*
90. To establish an estoppel *in pais*, it must be shown: 1st, That the person sought to be estopped, has made an admission or done an act, with the intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, inconsistent with the evidence he proposed to give, or the title he proposed to set up. 2nd. That the other party has acted upon, or been influenced, by such act or declaration. 3d. That the party will be prejudiced by allowing the truth of the admission to be disproved. [18 N. Y., 392.] *Ct. of Appeals, 1864, Brown v. Bowen, 30 N. Y., 519.*
91. Whether the debtor has more or less property, beyond the amount limited by the statute, is wholly immaterial in determining whether a team is necessary to him. Hence, evidence to show that that the party claiming his horse to be exempt, as being his "team," had, shortly before the same was levied on, owned two other horses worth two hundred dollars, and had other property which he had disposed of, and transferred the avails to his wife, which she held at the time of the levy, is improper, and should be excluded. *Ct. of Appeals, 1864, Wilcox v. Hawley, 31 N. Y., 648.*
92. That representations made in the presence and hearing of a party sued for deceit, and without objection from him, may be proved in connection with evidence of false representations previously made by him, as tending to show fraudulent intent. *Ct. of Appeals, 1865, Hubbard v. Briggs, 31 N. Y., 518, 537.*
93. Fraud is not ordinarily capable of being established by direct affirmative proof. Any evidence having a tendency, though it may be slight, to establish fraud, is not incompetent. Necessarily, considerable latitude is to be allowed in giving evidence of circumstances tending to prove the

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fraudulent intent. Thus, in an action for false representations as to the value of bank stock, evidence bearing upon the questions of the actual condition of the bank when the alleged representations were made, the defendant's knowledge of its condition, and whether such representations were made with the design to deceive or mislead, is legitimate and proper. *Ct. of Appeals*, 1865, *Hubbard v. Briggs*, 31 N. Y., 518.

90. While fraud is to be proved, and not inferred, it may be proved by circumstances, and by a train of connected circumstances leading to the main result. *Ct. of Appeals*, 1865, *Booth v. Bunce*, 33 N. Y., 139.
91. In an action against the sheriff for a false return of *nulla bona*, after the plaintiff has introduced evidence sufficient, *prima facie*, to establish property in the judgment debtor, and a levy thereon, the sheriff has a right to controvert such evidence, and to prove that such property did not belong to the judgment debtor, but to another person. *Supreme Ct.*, 1864, *Lumis v. Kasson*, 43 Barb., 373.
92. No different proof is required to establish a gift *causa mortis* than one *inter vivos*. It is essential to both that there should be an expression of purpose to make the gift, and an actual delivery of the subject thereof to the donee. In the one case, the gift becomes complete by delivery, in the other, by the death of the donor. In either, there is no gift without delivery. Gifts made in prospect of death are not favored by the courts; but when the proof establishes a valid gift of that nature, it is to be upheld. Nor where a party claims title to property by such a disposition, is he called upon, in order to sustain the claim, to show affirmatively, and with minuteness, the circumstances under which the alleged gift was made. He establishes a *prima facie* case when he shows that the disposition has been attended with all the requisites which the common law prescribes, to give it validity. He is not required to prove affirmatively that the donor was of sound disposing mind and memory, when he made the gift, and that the delivery of the subject was his free and voluntary act. These are matters of defence equally applicable to gifts *inter vivos* and *causa mortis*. *Ct. of Appeals*, 1865, *Bedell v. Carll*, 33 N. Y., 581.
93. E. died intestate, leaving a widow, the plaintiff, and certain minor children, who were supported by their mother for the period of two years and upwards. G. was appointed general guardian of the minor children, and administrator of the estate of E. There was a large amount of property, especially real estate, to be made liable for the support of the minor children. During the period of two years, G. had let the plaintiff, the widow, and mother of his wards, have several sums of money, amounting to nearly \$3,000. The plaintiff sued the defendant for money had and received for her use. The defendant sought to set off the money paid to the plaintiff as above stated against the claim established by the plaintiff. *Held*, that upon the question whether the money so paid by the defendant to the plaintiff, was paid to her for her use, or for the maintenance of her minor children, evidence that the guardian at the time of making such payments had no funds in his hands belonging to his wards, was too remote from

EVIDENCE.

- the issue, and too conjectural, to be admissible. *Ct. of Appeals*, 1865 *Elliott v. Gibbons*, 31 N. Y., 67.
94. In an action to recover damages for an injury to plaintiff's limb, there is no valid objection to the exhibition of the injured limb, by the plaintiff, to the surgeon called to describe the injury, before the jury. *Ct. of Appeals*, 1864, *Mulhado v. Brooklyn City Railroad Company*, 30 N. Y., 370.
95. What is sufficient evidence of negligence of the defendant, in an action for driving a wagon so as to run over the plaintiff. *Phelps v. Wait*, 30 N. Y., 78.
96. Of the materiality of evidence as to the election of trustees, in an action upon a subscription paper for the erection of a school, turning upon peculiar facts. *Wayne and Ontario Col. Inst. v. Devinney*, 43 *Barb.*, 220.
97. The acts of a sheriff in the return of a process, so far as the rights of parties are concerned, must be taken as true when they arise collaterally, and can only be impeached by direct proceedings, to which the officer is a party; or rectified upon a summary application to the court to correct or set aside the return. *N. Y. Com. Pl.*, 1860, *Sperling v. Levy*, 1 *Daly*, 95.
98. In an action for a penalty prescribed by a statute, the conditions upon which the penalty attaches must be affirmatively shown to have existed. *Ct. of Appeals*, 1864, *Commissioners of Pilots v. Vanderbilt*, 31 N. Y., 265.
99. Evidence of a master's authority from the owners of a vessel to bind the owners in the disposal of the cargo and purchase of a return cargo, in a peculiar case;—*Held*, sufficient. *Bidenlac v. Smith*, 31 N. Y., 259.
100. In an action of slander, in charging the plaintiff with perjury, where the words alleged are not actionable in themselves, the plaintiff must show that the testimony charged to have been false was material and pertinent to the issue; and although the materiality and pertinency will be presumed as matter of law, yet the contrary may be shown by defendant. *N. Y. Supreme Ct., Sp. T.*, 1866, *Wilbur v. Ostrom*, *Ante*, 275.
101. In an action for slander, the plaintiff, to show special damages, may give in evidence the contents of a letter written by the person to whom the slander was uttered, to his partner, advising him to discharge the plaintiff from their employ, and stating the substance of the writer's conversation with the defendant, although the letter did not cause the discharge of the plaintiff, but only an examination of his trunk. *Ct. of Appeals*, 1864, *Fowles v. Bowen*, 30 N. Y., 20.
102. In a case of a privileged communication,—*e. g.*, a statement to an employer relative to the honesty of his servant,—slight evidence of malice is sufficient to go to the jury. But there must be *some evidence* in order to sustain the action, something to indicate an intention to injure, more than mere general evidence that the words complained of were not true. *Ct. of Appeals*, 1864, *Fowles v. Bowen*, 30 N. Y., 20.
103. Of the evidence that will sustain a finding for the defendant in an action for trespass, in crossing plaintiff's premises after being forbidden. *Martin v. Houghton*, *Ante*, 339.
104. Evidence that the defendants knew that the sheriff had levied an execution, issued by them against a third person, upon property claimed by the

EVIDENCE.

- plaintiff as his assignees ; that they and their attorney withheld any specific directions, exempting the property claimed from execution and sale ; that they knew the property was advertised for sale, under the execution, and afterwards received the proceeds of the sale in payment of the execution, is sufficient to go to the jury upon the question whether the defendants did not by their acts ratify the taking and sale of the goods by the sheriff, and so render themselves liable for his acts. [11 Barb., 642 ; 8 Id., 357, distinguishing 6 Mann. & G., 236 ; 13 Ad. & E., 780.] *Ct. of Appeals*, 1864, *Brainerd v. Dunning*, 30 N. Y., 211.
105. Evidence of insane delusions affecting the mind of the testator, in a peculiar case ;—*Held*, sufficient to avoid his will. *American Seaman's Friend Society v. Hopper*, 33 N. Y., 619.
106. Where the death of witnesses to the execution of the will, or their entire forgetfulness of the facts attending the execution, makes it impossible to prove the paper directly, the will, if correct upon its face, may be proved by resort to evidence of the genuineness of the signatures, and other corroborating circumstances. [2 Bradf., 228 ; 4 Wend., 277 ; 2 Rev. Stat., 58, §§ 13, 16 ; Laws of 1837, ch. 460, § 20 ; Com. Rep., 531 ; 4 Cow., 489 ; 5 Id., 221, 224 ; 4 Eng. L. & Eq., 596 ; 24 N. Y., 51 ; 25 Id., 427 ; Str., 1096 ; 4 Burr, 22, 414 ; 3 Barb. Ch., 158 ; 2 Id., 40 ; 25 N. Y., 422 ; 27 Id., 10 ; Jarm. on Wills, 226 ; 10 Paige, 85, 90 ; 18 Barb., 434, 438.] *Supreme Ct.*, 1866, *Lawrence v. Norton*, 30 *How. Pr.*, 232.
107. What proof is sufficient in such a case. *Ib.*

DEPOSITION : DISCOVERY AND INSPECTION : ESTOPPEL : JUSTICE'S COURT, 13 :
NEW TRIAL : UNDERTAKING : WITNESS.

EXAMINATION OF PARTIES.

WITNESS.

EXCEPTIONS.

1. If a party, on the trial, objects to the admission of letters of administration when offered in evidence, merely as being incompetent, he cannot, on appeal, insist that they are void for want of jurisdiction in the surrogate. [7 N. Y., 345 ; 20 Barb., 409 ; 42 Id., 36.] *Supreme Ct.*, 1865, *Etheridge v. Ladd*, 44 Barb., 69.
2. Exceptions to the report of the referee, filed after the report, stating in general terms that "the plaintiff excepts to each and every one of the decisions and rulings of the referee, against the plaintiff, on the trial of this action, severally, separately and distinctively," amounts to nothing, and cannot be reviewed on appeal. *Ct. of Appeals*, 1865, *Newell v. Doty*, 33 N. Y., 83.
3. So also an exception that "the plaintiff excepts to each and every one of the referee's findings of fact, severally, separately and distinctively, found and stated in his report, and alleges that his findings on each and every one of the questions of fact submitted by him is unsupported by and contrary to the evidence," points to no specific error, and is entirely useless verbiage, if inserted in a case. *Ib.*

EXCEPTIONS.

4. The case on appeal showed that the counsel for the defendant presented to the judge six propositions in writing, and requested him to charge in accordance therewith: "Whereupon," the case states, "the justice, among other things, charged the jury"—setting forth the charge as given on several questions in the case. "At the close of the charge, the counsel for the defendant excepted thereto, so far as the same differed from the above requests."—*Held*, that this exception was not sufficient to raise any question for consideration. It is not an exception to any point of the charge as given; nor to any refusal of the judge to charge as requested; but to the whole charge, so far as it differed from the six propositions presented. But as the whole charge was not given, it was impossible to see wherein it did differ from such propositions. The charge was given professedly only in part, while the exception was to the whole, in so far as the whole, and not the part set forth, differed from the requests. This was altogether too loose and general. The counsel should have specifically pointed out the difference of which he complained, so that the mind of the judge might have been brought to the exact proposition, and he have had the opportunity to make any correction or explanation he thought advisable; or his refusal to charge each of the propositions should have been obtained, and an exception taken thereto. [2 Seld., 233; 1 Id., 422; 2 Kern., 319; 5 Seld., 170; 1 Kern., 416; Id., 420; 3 Seld., 266; 4 Id., 37; 1 Kern., 61.] *Ct. of Appeals*, 1864, *Chamberlain v. Pratt*, 33 N. Y., 47.
5. A general exception to the finding of a referee allowing interest is not specific enough: if the error is in allowing interest for too long a time, the exception should state from what period it should be computed. *Supreme Ct.*, 1865, *Graham v. Chrystal*, *Ante*, 121.
6. If the judge excludes the whole defence on the opening of the counsel, on the ground that the matters proposed to be proved do not constitute any defence one exception to the decision is good. It is not necessary for the defendant's counsel to repeat the statements again, and to take a separate ruling on each. *Supreme Ct.*, 1865, *Sawyer v. Chambers*, 44 Barb., 42.
7. Where counsel do not ask to have a question of fact submitted to the jury, but assent to its being determined by the presiding judge, the party is concluded by the finding of the judge. The judge having been substituted in the place of the jury on that question, and there being evidence to sustain the conclusion at which the court arrived, the matter of fact involved therein is not the subject of exception, nor reviewable in a court which passes only on questions of law. [28 Barb., 180; 6 Wend., 415; 2 Kern., 22, 23; 4 Seld., 78; 19 Wend., 444; 6 Hilt., 410.] *Ct. of Appeals*, 1865, *Marine Bank v. Clements*, 31 N. Y., 33.
8. Where a cause has been tried on the assumption of a fact, the absence of proof of that fact cannot be relied upon in determining exceptions at the general term. *Supreme Ct.*, 1865, *The People v. Hurlbult*, 44 Barb., 126.

EXECUTION.

EXECUTION.

1. Section 283 of the Code of Procedure,—authorizing the successful party to enforce his judgment by execution within five years,—amended by inserting a provision that in case of his death, his personal representative duly appointed may do the same. 2 *Laws of 1866*, 1869, ch. 824, § 10.
2. Where execution issues against several defendants, the party in whose favor it issues may direct the levy to be made upon the property of one or the other; and the plaintiff must conform his acts to such directions. The party in whose favor process issues, may give such instructions to the sheriff as will not only excuse him from his general duty, but bind him. Both the process and the law which conveys authority under it, are for the benefit of the party in whose behalf it is issued, and it is a general rule that a man may dispense with an entire law which is intended for his aid or protection. It follows that he may qualify it, to a greater or less extent, according to his discretion. [22 *Wend.*, 566; *Id.*, 569.] *Ct. of Appeals*, 1865, *Root v. Wagner*, 30 *N. Y.*, 9.
3. Where the acting members of a corporation have formed a second corporation, and have transferred the assets of the former corporation to the latter, with intent to hinder, delay, and defraud the creditors of the former, the property thus fraudulently transferred is still liable to be taken on execution as the property of the former corporation. *Ct. of Appeals*, 1865, *Booth v. Bunce*, 33 *N. Y.*, 139.
4. "The team" which the exemption law (*Laws of 1842*, ch. 157) exempts from execution, may be either one, or any number of animals, which a householder or head of a family uses in the business of providing for a family, not exceeding in value the limits fixed by the statute. (*Laws of 1859*, 343, ch. 134.) *Ct. of Appeals*, 1864, *Wilcox v. Hawley*, 31 *N. Y.*, 648.
4. In addition to the articles now exempted by law from levy and sale under execution, there shall be exempted from such sale, necessary household furniture, and working tools and team, *professional instruments, furniture, and library* owned by any person being a householder, or having a family for which he provides, to the value of not exceeding two hundred and fifty dollars, *and in addition thereto there shall be exempted from such levy and sale the necessary food for said team for a period not exceeding ninety days, and a sewing machine*; provided that such exemption shall not extend to any execution issued on a demand for the purchase money of such furniture, tools, or team, *or the food for said team, or professional instruments, furniture, or library, sewing machine, or the articles now enumerated by law.* *Laws of 1842*, ch. 157, as amended by 2 *Laws of 1866*, 1866, ch. 782.*
6. Where a deputy sheriff posted a notice of sale on execution in a grocery, and the wind having blown it down, it was picked up and laid upon the counter, and the defendant, after inquiring if the deputy had left any notice there, took up the notice and carried it away, saying "he did not want any such thing up with his name on it," and that "it was his business to take them down," and he would take them all down;—*Held*, that these facts brought the case within the statute which makes any person

* The amendment consists in the insertion of the words italicised above, and in making the limit of the value two hundred and fifty instead of one hundred and fifty dollars.

EXTRADITION.

- who shall "take down or deface" a notice of that description liable to a penalty of \$50. *Supreme Ct.*, 1865, *Murphy v. Tripp*, 44 *Barb.*, 189.
7. Where the execution is for more than \$500, a defendant applying for a discharge under the statute, must have been three months charged in execution. It is not enough that his imprisonment under the execution and the order of arrest has continued for three months. *Supreme Ct.*, *Sp. T.*, 1864, *Dusar v. Delacroix*, *Ante*, 409, *note*.
 8. Under the provision of 2 Rev. Stat., 556,—where a defendant has been arrested in the action, the three months within which the plaintiff must charge him in execution is from the last day of the special term for non-enumerated motions, following that at which judgment was obtained. *Supreme Ct.*, *Sp. T.*, 1865, *Haviland v. Kane*, *Ante*, 409.
 9. Attachment may issue against the guardian of an infant, for costs. *Grantman v. Thrall*, 31 *How. Pr.*, 464.

EXECUTORS AND ADMINISTRATORS.

1. Under the provision of 2 Rev. Stat., 271 (Edm. ed.)—regulating the priority of right to letters of administration,—the guardian of an infant who is not a residuary or specific legatee is not entitled to letters of administration in preference to the widow. The adult is entitled to preference over an infant, who but for such infancy would have been preferred. [15 *Barb.*, 304.] *Supreme Ct.*, 1864, *Cluett v. Mattice*, 43 *Barb.*, 417.
 2. Where a will directs an executor to invest a fund, and accumulate the proceeds for the benefit of a minor, without anything indicating the intention to create a separate and distinct trust, the executor will hold as executor, rather than as a trustee; and his commissions are to be computed accordingly. *N. Y. Supreme Ct.*, 1865, *Lansing v. Lansing*, *Ante*, 280.
 3. Where a fund is set apart, and the income given for the benefit of the legatee, without specifying a certain amount of income, the commissions and taxes are chargeable upon it, and not on the general estate. *Ib.*
 4. An executor is not charged compound interest, except in clear cases. *Ib.*
 5. If the will directs an investment to be made upon a specified sort of security, and the executor finds none of the kind offering, he is not bound to seek the instructions of the court, but will be held to have performed his duty if in good faith and a sound discretion he adopts such investment as a prudent and intelligent man would do, managing his own affairs, not in reference to large gains, but the safety of the principal and the probable income. *Ib.*
 6. An executor or other trustee of a fund invested in land, who pays the highway taxes thereof, by his personal labor, is entitled to be allowed the amount thereof in his account, as if it had been paid in money. *Ib.*
- * CAUSE OF ACTION, 13, 21 : COSTS, 3, 10 : EXECUTION, 1 : JUDGMENT, 11 :
LIMITATIONS OF ACTIONS, 2 : SURROGATE'S COURT : WITNESS.

EXTRADITION.

1. In order to give the governor of a State jurisdiction to issue his warrant for the rendition, under the Constitution of the United States, of a fugitive

FORECLOSURE.

from justice of another State, the fugitive must be demanded by the executive of the latter State, a copy of the indictment or affidavit before a magistrate charging the offence must be produced, and such copy must be certified as authentic by the executive. *N. Y. City Judge*, 1866, Solomon's Case, *Ante*, 347.

2. An affidavit sworn before a justice of the peace, and a certificate by the executive, that he is such officer, and that his attestation is in due form is not sufficient in this respect. *Id.*

FEIGNED ISSUES.

SURROGATE'S COURTS, 4: TRIAL, 3, 4.

FENCES.

The provisions of the Revised Statutes as to division fences, and proceedings relative thereto, amended. *2 Laws of 1866*, 1150, ch. 540.

FORECLOSURE.

1. After default in the payment of a chattel mortgage, which gives the mortgagee power to sell, without specifying the mode, a sale at private sale, without notice to the mortgagee, if made fairly and in good faith, is valid. The fact that the power of sale on default is merely "to sell," without specifying the mode, while another clause is inserted giving power, in case of insecurity, "to sell at public or private sale," is not to be regarded as intended to make a distinction between the modes of sale in the two cases. *Supreme Ct.*, 1865, *Chamberlain v. Martin*, 43 *Barb.*, 607.
2. Where there has been a sale of mortgaged premises, pursuant to a power under the statute [3 Rev. Stat., 547, §8] the equity of redemption of the mortgagor is thereby foreclosed; notwithstanding the affidavit of the publication of notice of sale, and of the posting thereof, is not made and recorded as required by statute for twenty years thereafter. No time is fixed by statute for making and recording any of the affidavits prescribed; and the delay in making and recording them does not extend the right of redemption. The right of the mortgagor to redeem is terminated whenever there has been a sale of the mortgaged premises, regularly made, either pursuant to the power contained in the mortgage, or under a decree of sale. *Ct. of Appeals*, 1865, *Tuthill v. Tracy*, 31 *N. Y.*, 157.
3. Where there are surplus moneys in the hands of the mortgagee, arising upon the foreclosure of a mortgage under the statute, and two several actions have been brought by judgment creditors of the mortgagor to obtain such surplus, to be applied on payment of their respective judgments, and a reference has been ordered to determine to whom, as between the plaintiffs, the same shall be delivered, and neither party appeals from such order, or applies for an order for the referee to report the evidence, the proceeding must be treated in all respects like an order made in pursuance of the 76th rule of the Supreme Court, to settle the right to surplus moneys in foreclosure cases. By omitting to appeal from such order of re-

FORMER ADJUDICATION.

ference, both parties consent to that method of determining their respective rights. *Ct. of Appeals*, 1865, *Kirby v. Fitzgerald*, 31 N. Y., 417.

COSTS, 12 : COUNTY COURT, 1.

FORMER ADJUDICATION.

1. Where a claim has been interposed in a former action, by way of set-off, and has been duly passed upon in such action, it is *res adjudicata*, and the former action is a bar to a new action by the defendant against the plaintiff in the former suit. *N. Y. Com. Pl.*, 1862, *Rogers v. Rogers*, 1 *Daly*, 194.
2. Where it appears, in an action before a justice of the peace, that the title to land is in question, and that such title is disputed by the defendant, the justice is prohibited from taking cognizance of the action, and is bound to dismiss it; and if he proceeds in the suit, after it so appears that the title to land is in question, and is disputed, his proceedings are without authority; and his judgment is void for want of jurisdiction, and is not admissible in a subsequent suit between the same parties, for the purpose of establishing the fact the question involved was *res adjudicata*. *Supreme Ct.*, 1864, *Gage v. Hill*, 43 *Barb.*, 44.
3. Relief on habeas corpus is not to be refused in a proper case upon the ground that upon a prior writ, issued by another judge, relief has been refused, if it appears upon the second application that essentially different facts are involved from those which were presented on the first application. *City Judge of N. Y.*, 1866, *People v. Kelly*, 1 *Abb. Pr. N. S.*, 432.
4. A judgment in favor of the defendants, in an action to recover the price or goods sold, which proceeded upon the ground that they were sold on a credit which had not expired when the action was brought, is not a bar to a second action, brought after the credit has expired. *N. Y. Superior Ct.*, 1863, *Wilcox v. Lee*, *Ante*, 250.
5. Where such judgment does not affirmatively disclose the ground upon which it proceeded, but there was uncontradicted proof of such unexpired credit, and the existence of such credit was the only question argued on submitting the case, it will be inferred that the judgment proceeded solely on that ground, although evidence in support of another defence was given on the trial. *Ib.*
6. That the courts have no power, in collateral proceedings, to inquire whether the facts upon which a board of health determine a thing to be a nuisance justify its conclusion. [15 *Wend.*, 262.] *N. Y. Com. Pl.*, 1862, *McLaren v. Mayor of New York*, 1 *Daly*, 243.
7. Where the affidavit of the defendant in summary proceedings to dispossess for the non-payment of rent raises two questions, and the jury finds generally for the defendant, both questions are presumptively *res adjudicata*; and in a subsequent proceeding, in which one of such questions arises, it is for the plaintiff to show that it was not passed upon by the jury. *N. Y. Com. Pl.*, 1865, *Yonkers and New York Fire Insurance Co. v. Bishop*, 1 *Daly*, 449.

JUDGMENT : JUSTICE COURT, 15 : RELIGIOUS CORPORATIONS, 8.

HABEAS CORPUS.

GOOD-WILL.

1. A retiring partner, who releases and assigns all his interest in the good-will of the business of the firm to his copartner, does not thereby relinquish his right to establish and carry on a business similar to that of the late firm, so long as he does no act to mislead customers into the belief that he is carrying on business as the successor of the old firm, or that when dealing with him, they are dealing with such successor. *N. Y. Superior Ct., 1866, White v. Jones, Ante, 328.*
2. Nor does one who was formerly bookkeeper of the late firm, and who, upon its dissolution, unites with such retiring partner in establishing such new business, thereby become liable to an action, by the purchaser of the good-will, for an injunction or damages. *Ib.*

GRAND JURY.

An indictment should not be quashed upon the ground that there was not sufficient evidence before the grand jury, if there was before them testimony upon which, on their oaths, they could fairly act. If they have some evidence, it is for them to determine its weight. *N. Y. General Sessions, 1865, The People v. Strong, Ante, 241.*

HABEAS CORPUS.

1. A State court has power to issue a writ of *habeas corpus* in a case where the party detained is held or claimed to be held under the authority of the laws of the United States. *Supreme Ct., Sp. T., 1865, The People v. Gaul, 44 Barb., 98.*
2. A magistrate, before whom a prisoner is brought upon *habeas corpus*, charged with a crime which is indictable under the statutes of the State, but which is not cognizable by the military tribunals, for trial before which he is held, should, on discharging the prisoner from military custody, commit him, if the proof be sufficient, to the civil authorities, to be proceeded against by law in the courts of the State. *Supreme Ct., Chambers, 1865, Matter of Martin, 45 Barb., 142.*
3. Where the return to a *habeas corpus* shows a detainer under legal process, the only proper points for examination are the existence, validity, and present legal force of the process; except where, in commitments for criminal matters, the court or officer hearing the *habeas corpus* is invested with revisory or corrective jurisdiction over the court or officer commanding the imprisonment, and with a jurisdiction also over the offence, or subject-matter of the commitment; in which case the facts constituting the grounds of the commitment may be reviewed. *City Judge of N. Y., 1866, People v. Kelly, Ante, 432.*
4. The *habeas corpus* can not have the force and operation of a writ of error, or a *certiorari*; nor is it designed as a substitute for either. It does not, like them, deal with errors or irregularities, which render a proceeding voidable only; but with those radical defects which render it absolutely void. *Ib.*

INDICTMENT.

5. Illegality signifies that which is contrary to the principles of law, and denotes "a complete defect in the proceedings." *Ib.*
6. Hence, where a defendant has been arrested a second time, after a discharge and exoneration for imprisonment from the same cause in another action, he may be discharged on *habeas corpus*, notwithstanding relief might be had, on motion, in the court from which the process was issued. *Ib.*

FORMER ADJUDICATION, 3: NEW YORK, 5.

HIGHWAYS.

Under the various statutes relating to proceedings for opening roads, the county judge, upon an appeal to him from the decision of a jury, certifying to the necessity of a private road, and from an order of commissioners of highways laying out such road, has authority to dispose of the appeal in the manner prescribed by statute in respect to public roads; which includes the power to appoint referees to hear such appeal. *Supreme Ct.*, 1864, *West v. McGurn*, 43 *Barb.*, 198.

CERTIORARI, 7: EXECUTORS AND ADMINISTRATORS, 6.

INDEMNITY.

Mutilated note of which the part which is lost does not contain negotiable words, not a *lost* note within the rule requiring a bond of indemnity to be given on demanding payment of lost notes. *N. Y. Com. Pl.*, 1863, *Martin v. Blydenburg*, 1 *Daly*, 314.

INDICTMENT.

1. Although, as a general rule, criminal complaints must originate in the police offices, and the court will, on motion, relieve against an indictment if it originated with the grand jury; yet where the interference of that body is necessary to prevent the statute of limitations from attaching, the indictment will not be quashed on that ground. *N. Y. Gen. Sess.*, 1865, *People v. Strong*, *Ante*, 244.
2. It makes no difference in such a case that the prosecution might have brought the offence to the knowledge of the authorities at an earlier time. *Ib.*
3. Even after the arraignment of the prisoner, and plea, and part of the jury called, the court have no power to postpone the cause, and such commencement of a trial cannot be pleaded in bar of a second indictment for the same offence. *Supreme Ct.*, 1865, *People v. Ferris*, *Ante*, 193.
4. *It seems*, that it is only in very clear cases that a prisoner should be allowed to withdraw his plea and move to quash the indictment, without the consent of the prosecuting attorney. *People v. Strong*, *Ante*, 244.

VARIANCE, 2.

INJUNCTION.

1. Where the conditions of dissolution of a partnership were such that the retiring partner had the right to open, and attend to, for his own benefit, letters thereafter addressed to the late firm, upon certain subjects of business ;—*Held*, that the mere fact that he opened, and answered, in his own name, and for his own benefit, two fictitious or “decoy” letters, addressed to the late firm at the instance of the plaintiff, their successor, and purporting to be upon business which the former had not the right to attend to, did not authorize the court to interfere by action and injunction. *N. Y. Superior Ct.*, 1863, *White v. Jones*, *Ante*, 328.
2. Where the plaintiff had made advances for the benefit of a vessel, and had taken an assignment of the master's lien on the freight therefor, and the owners of the vessel were insolvent ;—*Held*, a proper case for an injunction, and the appointment of a receiver to collect such freight, notwithstanding the allegations of the answer and affidavits showed that the defendants had chartered the vessel from the owner for such voyage. *N. Y. Com. Pl.*, 1859, *Sorley v. Brewer*, 1 *Daly*, 79 ; affirming *S. C.*, 18 *How. Pr.*, 276, 509.
3. An injunction will not lie at the suit of the owner of a wharf or bulkhead, having a mere easement in the nature of wharfage, in respect to the land under water in front thereof, to prevent the erection of a pier or wharf by an adjoining owner, under the sanction of public authority. *N. Y. Supreme Ct.*, 1865, *Taylor v. Brookman*, *Ante*, 169.
4. If injured by such erection, his remedy is by an action for damages for the obstruction of his easement ; or, if he can show title to the land on which the erection is made, by an action to recover possession thereof. *Ib.*
5. The court will not, upon a preliminary injunction, decide a question involving a forfeiture of corporate rights ; nor usually grant a preliminary injunction if there is to be a trial involving such important rights, unless it appears from the papers before the court that serious injury will follow the refusal of it. *Supreme Ct., Sp. T.*, 1865, *People v. Harlem Bridge Co.*, *Ante*, 169, *note*.
6. In cases of cross-indebtedness growing out of mutual dealings, a court of equity will always interpose to set off one debt against the other, and adjudge the balance to be the sum equitably due ; and if the action is maintainable, an injunction to prevent one party who holds a negotiable note from disposing of it, is proper. *N. Y. Com. Pl.*, 1863, *Schieffelin v. Hawkins*, 1 *Daly*, 289.
7. Directors or trustees of a corporation may be restrained by injunction from committing fraudulent acts charged ; but such injunction should apply only to the particular acts complained of, and not to the general business of the corporation. *Supreme Ct.*, 1865, *Howe v. Deuel*, 43 *Barb.*, 505.
8. Injunctions may be issued to restrain violations of Fire and Building laws of the City of New York. 2 *Laws of 1866*, 2029, ch. 873, § 35.

INQUEST.

9. After the Legislature have granted the right to lay a railroad through city streets, the courts will not restrain, by injunction, persons to whom a subsequent grant has been made, of the power to use the same streets, crossing and passing along the same track, upon making compensation for the use thereof. *Supreme Ct.*, 1864, *Sixth Avenue R. R. Co. v. Kerr*, 45 *Barb.*, 138.
10. Injunction allowed to restrain laying a city railroad track—in a particular case. *Dry-dock R. R. Co. v. N. Y. & Harlem R. R. Co.*, 30 *How. Pr.*, 39.
11. Injunction against interference with property on a guano island in the Pacific. *American Guano Co. v. U. S. Guano Co.*, 44 *Barb.*, 23.
12. An injunction is not to be granted upon the ground that it will prevent a multiplicity of suits, where there are only two actions for the same cause. Two suits have never been considered sufficient to sustain a bill in equity for such cause. The fact that the suits were commenced by attachment does not alter the rule. *Supreme Ct.*, 1866, *McHenry v. Hazard*, 45 *Barb.*, 657.
13. That an injunction against public officers sued by their individual names would not bind their successors or the public. *Supreme Ct.*, 1863, *Magee v. Cutler*, 43 *Barb.*, 239.
14. In an action brought to establish the plaintiffs' title to certain chattels, the plaintiffs on the usual undertaking obtained an injunction restraining the defendants from interfering with the property, and under shelter of that injunction, took away the property, and disposed of it, so that it was irrecoverably lost—*Held*, that on a reference to ascertain damages sustained by the injunction, the referee was right in allowing the defendants the value of the property. *Ct. of Appeals*, 1864, *Barton v. Fisk*, 30 *N. Y.*, 166.
15. If the property had remained specifically the same during the litigation, and at its conclusion had been within the defendant's reach, the damages would have been such as resulted from their being deprived of its use *pendente lite*, and from any depreciation in value. But under the existing facts, it is the same as though it had been destroyed, while the owners were prevented from extending their hands for its preservation. The argument that the loss was not occasioned by the injunction, but by the tortious act of the plaintiff and his assistant, unconnected with that process, was too narrow a view of the question. The efficient cause of the loss was the inability of the defendants, caused by the injunction, to preserve the property. *Ct. of Appeals*, 1864, *Barton v. Fisk*, 30 *N. Y.*, 166.

CORPORATION: GOOD-WILL, 1, 2: LIMITATION OF ACTIONS, 4.

INQUEST.

After the lapse of two years from the entry of judgment upon an inquest, and the giving notice thereof to the defendant, the parties having been resident within the jurisdiction of the court, a motion to open the inquest will not be entertained. *N. Y. Superior Ct.*, *Sp. T.*, 1864, *Hendricks v. Carpenter*, *Ante*, 213.

INSURANCE.

INSOLVENCY.

1. In proceedings for the discharge of an insolvent from his debts, under 2 Rev. Stat., 35, the omission of a petitioning creditor to relinquish a security held by him, does not affect the jurisdiction of the officer, nor avoid the discharge, even though his petition disclosed the existence of such security. *N. Y. Superior Ct.*, 1863, *Soule v. Chase*, *Ante*, 48.
2. Nor is the proof of publication of notice of the order to creditors to show cause, essential to give jurisdiction. A discharge which recites due publication and that due proof thereof was presented, is not invalidated by defects in the notice, its publication, or the proof thereof, on file. *Ib.*
3. The statute does not require publication for a certain length of time, but ten publications, each within so many successive weeks, the commencement of which is determined by the first publication. *Ib.*
4. The petitions and schedules need not state the grounds of the demands of creditors with such particularity as is required in a statement for judgment by confession; and it seems that want of sufficient particularity does not affect the jurisdiction of the officer. *Ib.*

DISCHARGE: NOTICE, 1, 2.

INSURANCE.

1. Where a policy of insurance upon a stock of merchandise covered the goods sold but not delivered, and its printed conditions provided that "in case of any transfer or termination of the interest of the insured in the property, by sale or otherwise, * * * the policy shall be void;" and "that in case of any sale, alienation, transfer or change of title in the property insured, * * * or of any individual interest therein, such insurance shall be void; and the entry of a foreclosure of a mortgage, or the levy of an execution, or an assignment for the benefit of creditors, shall be deemed an alienation of the property;"—*Held*, that the giving of a chattel mortgage upon the goods, without parting with the possession, or the right to possession, did not avoid the policy. The words "sale, alienation or transfer" should be construed to mean some act which divests the title absolutely. *N. Y. Superior Ct.*, 1863, *Van Deusen v. The Charter Oak Fire and Marine Insurance Company*, *Ante*, 349.
2. If insurers, having insured one who has a special property in goods, for account of whom it may concern, after a loss and abandonment, intervene and recover a part of the goods, as they have a right to do, and receive the proceeds, without knowing the owner, and are subsequently sued by the owner, for money received, they are not liable for interest for the period before they had notice of his claim; and in such action the necessary expenses of the defendants, paid in recovering and selling the goods insured, are to be allowed to the defendants, to be deducted from the proceeds. *N. Y. Superior Ct.*, 1863, *Robinson v. Corn Exchange Insurance Company*, *Ante*, 186.
3. Where insurers received and examined the proofs of loss presented by the

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insured, and, in answer to subsequent inquiries on his part, whether there were any further proofs that he could show, or anything further was wanted of him, answered that there was not, and afterward offered to compromise the claim, but without making any objection to the proofs;—*Held*, that they could not defeat his action on the policy by objecting that the magistrate's certificate, which the policy required should accompany the proofs of loss, was never served on them. *N. Y. Superior Ct.*, 1863, *Van Deusen v. The Charter Oak Fire and Marine Insurance Company*, *Ante*, 349.

CONTRIBUTION : LIMITATION OF ACTION, 7: PARTIES, 22.

INTEREST.

1. The old common law rule, which requires a demand to be liquidated, or its amount ascertained, before interest can be allowed, has been so far modified, that if the amount is capable of being ascertained, it carries interest. *Supreme Ct.*, 1865, *Graham v. Chrystal*, *Ante*, 112.
2. Where insurers, having insured one who has a special property in goods, for account of whom it may concern, after a loss and abandonment intervene and recover a part of the goods, as they have a right to do, and receive the proceeds, without knowing the owner, the latter cannot, in an action against them for money had and received, recover interest thereon for the time elapsing before they had any notice of his claim. *N. Y. Superior Ct.*, 1863, *Robinson v. Corn Exchange Insurance Company*, *Ante*, 186.

EXECUTORS AND ADMINISTRATORS, 4, 5.

INTERPLEADER.

1. An action cannot be sustained as being a case for interpleader, where the plaintiff denies any liability to either of the defendants, and neither admits that anything is due to one of them, nor offers to bring the amount in dispute into court. *Supreme Ct.*, 1866, *McHenry v. Hazard*, 45 *Barb.*, 657.
2. Neither can the action be sustained in such a case by considering it an action in the nature of a bill of interpleader, to prevent danger of a double recovery against the plaintiff. An action in the nature of a bill of interpleader can only be sustained where the parties sought to be interpleaded have some right or interest in the subject-matter of the action, which interferes with the plaintiff's attempts to establish his own rights. *Ib.*

JOINDER OF ACTIONS.

In an action against a sheriff, two causes of action, one for detaining the plaintiff's property, the other for wrongfully and negligently injuring it while in his possession as sheriff, may be joined in one action. Both are to be regarded as arising out of the same transaction, and if they were not so to be regarded, the defendant should demur; and by omitting to do so he waives the question. *Supreme Ct.*, 1864, *Smith v. Orser*, 43 *Barb.*, 187.

TRIAL, 7.

JOINT DEBTORS.

1. Section 372 of the Code of Procedure amended to read as follows: Upon such summons any party summoned may answer within the time specified therein, denying the judgment, or setting up any defence thereto which may have arisen subsequent to such judgment; and in addition thereto, if the party be proceeded against according to section 375, he may make any defence which he might have made to the action if the summons had been served on him at the time when the same was originally commenced, and such defence had been then interposed to such action. *Code of Pro.*, § 377, as amended by 2 *Laws of 1866*, 1844, ch. 824, § 15.
2. Where joint debtors are sued, and judgment had against all in form without service on all, the defendants not served are not "judgment debtors" within the meaning of the provision of the Code of Procedure, (§ 380), which authorizes summoning the representatives of a deceased judgment debtor to show cause why the judgment should not be enforced against his estate in their hands. *N. Y. Com. Pl.*, 1866, *Foster v. Wood*, *Ante*, 150.
3. The proper remedy of a judgment creditor in such a case, is to present his demand to the executors or administrators, and if they refuse to pay it, or to refer the claim, to bring his action thereon. *Ib.*

JOINT LIABILITY.

An action may be maintained against principal and agent jointly for a personal injury occasioned by the negligence of the agent. *So held*, where the negligent act of the agent was committed in the absence of the principal. [19 *Wend.*, 343; 3 *E. D. Smith*, 591; 8 *Barb.*, 385; 10 *Am. Law Reg.*, 505.] *Ct. of Appeals*, 1864, *Phelps v. Wait*, 30 *N. Y.*, 78.

JUDGE.

CONTEMPT, 3: REFERENCE, 7.

JUDGMENT.

1. Where there is only one issue, and the intention of the jury to find for the plaintiff is manifest, the court will, in case of a mistake by them, correct their verdict by making it conform to their finding, and give judgment upon it accordingly. *N. Y. Com. Pleas*, 1865, *Wells v. Cox*, 1 *Daly*, 515.
Consult also AMENDMENT.
2. Thus, where on the trial the court charged the jury that if their finding was in favor of the plaintiff, the amount due him was only a specified sum, and the jury found for the plaintiff, but forgetting the amount given by the court, returned a sealed verdict for the plaintiff "for the whole amount claimed, and interest,"—*Held*, that the court could, on motion, correct the verdict by inserting in it the sum stated in the charge. *Ib.*
3. If, in equitable actions, all the questions in controversy between the parties have been determined upon the hearing, and what remains is merely the machinery set in motion by the court to carry its decision into effect,

JUDGMENT.

- its decision is final. But if anything is left involving future litigation the determination upon which might affect the ultimate adjustment of the rights of the parties, the decision, decree or order made, is merely interlocutory. [8 Wend., 224; 12 Johns., 500; 17 Id., 558; 7 Paige, 18; 2 Daniels' Ch. Pr., 638, 682.] And this is a distinction which still exists necessarily in actions for equitable relief. *N. Y. Com. Pleas*, 1865, *Smith v. Lewis*, 1 *Daly*, 452.
4. An order for the continuance of the term of the court of sessions beyond the third week need not be incorporated in the record of judgment on a conviction had during such continuance. *N. Y. Supreme Ct.*, 1865, *People v. Ferris*, *Ante*, 193.
 5. An order appointing the plaintiff receiver of the property of B., a judgment debtor, was founded on a demand owing by P. & B., as copartners. The property in the hands of their assignees, and which the latter were directed by the judgment to transfer to the plaintiff, was the separate property of B. The judgment also directed the receiver to apply the avails of said separate property to the payment of the said copartnership demand;—*Held*, that the judgment was erroneous, in the absence of any evidence that the separate debts of B. had been paid. In equity, the separate estate of partners is not liable for partnership demands until the partnership effects are exhausted, and the separate debts paid. *Supreme Ct.*, 1864, *Terry v. Butler*, 43 *Barb.*, 295.
 6. When an answer is struck out as sham and irrelevant, the proper method of obtaining judgment is to proceed as if no answer had been put in. If the summons be for relief, the defendant is entitled to the usual notice of application for judgment, after the answer has been stricken out. *N. Y. Superior Ct.*, 1863, *De Forest v. Baker*, *Ante*, 34.
 7. A judgment entered against several joint debtors upon service of summons upon only a part of them, is a judgment in form, only, as against those not served. *N. Y. Com. Pleas*, 1866, *Foster v. Wood*, *Ante*, 150.
 8. Where one partner, without the knowledge or consent of his copartners, indorsed the name of the firm upon a promissory note made for his individual benefit, and, being sued upon the note, he, without the knowledge or authority of the other partners, upon whom process had not been served, employed an attorney to appear not only for himself, but for them, and judgment was rendered against all;—*Held*, notwithstanding there was an appearance by attorney, that the judgment would be set aside, under such circumstances, against the other partners, and that they would be allowed to come in and defend. *N. Y. Com. Pleas*, 1865, *Bean v. Mather*, 1 *Daly*, 440.
 9. Where the affidavits presented to a judge, on an application for an order of publication, tend to establish the requisite jurisdictional facts to authorize him to make the order, his error in the decision to grant the order upon such evidence, is a judicial error, which cannot be questioned in a collateral proceeding. But if the judgment has been set aside, upon the ground of the insufficiency of the proofs made to the judge as the basis of the order for publication, it is no longer of any validity, for any purpose, so as to protect any persons for acts done under it, except

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mere ministerial officers. *Supreme Ct.*, 1865, *Wells v. Thornton*, 45 *Barb.*, 390.

10. Such a judgment will constitute no justification or protection to a person not a party to the suit, who delivers up to the receiver appointed therein, property which, as a bailee, he is bound to keep for his bailor. *Ib.*
11. No judgment can be entered, even by the special direction of a court, upon the report of referees, to whom a controversy between the receiver of a corporation and other parties is referred, pursuant to 2 Rev. Stat., 45. *Supreme Ct.*, 1865, In the matter of *Austin*, 44 *Barb.*, 434.
12. Where executors or administrators are sued on a debt of their decedent, judgment for the plaintiff should be in terms that the plaintiff recover against them the sum mentioned in it, to be levied of the goods and chattels, &c., in their hands as executors, &c. *Supreme Ct.*, 1866, *Bank of Cooperstown v. Corlies*, *Ante*, 412.
13. Section 136 of the Code of Procedure,—which prescribes the mode of proceeding in an action against several defendants, where the summons is served on a part only,—amended by adding the following provision: If the name of one or more parties shall, for any cause, have been omitted in any action in which judgment shall have passed against the defendants named in the summons, and such omission shall not have been pleaded in such action, the plaintiff, in case the judgment therein shall remain unsatisfied, may, by action, recover of such partner separately, upon proving his joint liability, notwithstanding he may not have been named in the original action; but the plaintiff shall have satisfaction of only one judgment rendered for the same cause of action. 2 *Laws of 1866*, 1837, ch. 824, § 5.
14. Section 335 of the Code of Procedure,—which authorizes the defendant to offer to allow judgment before verdict,—amended by adding: That in case the defendant shall set up a counter-claim in his answer to an amount greater than the plaintiff's claim, or sufficient to reduce the plaintiff's recovery below fifty dollars, then the plaintiff may serve upon the defendant an offer in writing to allow judgment to be taken against him for the amount specified, or to allow said counter-claim to the amount specified, with costs. If the defendant accept the offer, and give notice thereof in writing within ten days, he may enter judgment as above for the amount specified, if the offer entitle him to judgment, or the amount specified in said offer shall be allowed him in the trial of the action. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the defendant fail to recover a more favorable judgment, or to establish his counter-claim to a greater amount than is specified in such offer, he cannot recover costs, but must pay the plaintiff's costs from the time of the offer. 2 *Laws of 1866*, 1845, ch. 824, § 16.
15. Where the defendant, after service of an offer to allow the plaintiff to take judgment for a specified sum, and within the ten days allowed for the plaintiff's acceptance, served an answer and counter-claim demanding judgment of the plaintiff for a larger sum than the amount of the offer, and upon the trial the plaintiff recovered a few cents less than the defendant's offer;—*Held*, that he was nevertheless entitled to costs: for by the extinguishment of the counterclaim, he recovered a more favorable judgment. *Supreme Ct.*, *Tompkins v. Ives*, 30 *How. Pr.*, 13.
15. Judgment may be rendered against one defendant alone, in the marine court, in an action *ex delicto*, although section 136 of the Code does not apply to the marine court. *N. Y. Com. Pl.*, 1861, *Ballard v. Lockwood*, 1 *Daly*, 158.

- its decision is final. But if anything is left involving future litigation the determination upon which might affect the ultimate adjustment of the rights of the parties, the decision, decree or order made, is merely interlocutory. [8 Wend., 224; 12 Johns., 500; 17 Id., 558; 7 Paige, 18; 2 Daniels' Ch. Pr., 638, 682.] And this is a distinction which still exists necessarily in actions for equitable relief. *N. Y. Com. Pleas*, 1865, *Smith v. Lewis*, 1 *Daly*, 452.
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 6. When an answer is struck out as sham and irrelevant, the proper method of obtaining judgment is to proceed as if no answer had been put in. If the summons be for relief, the defendant is entitled to the usual notice of application for judgment, after the answer has been stricken out. *N. Y. Superior Ct.*, 1863, *De Forest v. Baker*, *Ante*, 34.
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 8. Where one partner, without the knowledge or consent of his copartners, indorsed the name of the firm upon a promissory note made for his individual benefit, and, being sued upon the note, he, without the knowledge or authority of the other partners, upon whom process had not been served, employed an attorney to appear not only for himself, but for them, and judgment was rendered against all;—*Held*, notwithstanding there was an appearance by attorney, that the judgment would be set aside, under such circumstances, against the other partners, and that they would be allowed to come in and defend. *N. Y. Com. Pleas*, 1865, *Bean v. Mather*, 1 *Daly*, 440.
 9. Where the affidavits presented to a judge, on an application for an order of publication, tend to establish the requisite jurisdictional facts to authorize him to make the order, his error in the decision to grant the order upon such evidence, is a judicial error, which cannot be questioned in a collateral proceeding. But if the judgment has been set aside, upon the ground of the insufficiency of the proofs made to the judge as the basis of the order for publication, it is no longer of any validity, for any purpose, so as to protect any persons for acts done under it, except

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mere ministerial officers. *Supreme Ct.*, 1865, *Wells v. Thornton*, 45 *Barb.*, 390.

10. Such a judgment will constitute no justification or protection to a person not a party to the suit, who delivers up to the receiver appointed therein, property which, as a bailee, he is bound to keep for his bailor. *Ib.*
11. No judgment can be entered, even by the special direction of a court upon the report of referees, to whom a controversy between the receiver of a corporation and other parties is referred, pursuant to 2 Rev. Stat., 45. *Supreme Ct.*, 1865, *In the matter of Austin*, 44 *Barb.*, 434.
12. Where executors or administrators are sued on a debt of their decedent, judgment for the plaintiff should be in terms that the plaintiff recover against them the sum mentioned in it, to be levied of the goods and chattels, &c., in their hands as executors, &c. *Supreme Ct.*, 1866, *Bank of Cooperstown v. Corlies*, *Ante*, 412.
13. Section 136 of the Code of Procedure,—which prescribes the mode of proceeding in an action against several defendants, where the summons is served on a part only,—amended by adding the following provision: If the name of one or more parties shall, for any cause, have been omitted in any action in which judgment shall have passed against the defendants named in the summons, and such omission shall not have been pleaded in such action, the plaintiff, in case the judgment therein shall remain unsatisfied, may, by action, recover of such partner separately, upon proving his joint liability, notwithstanding he may not have been named in the original action; but the plaintiff shall have satisfaction of only one judgment rendered for the same cause of action. 2 *Laws of 1866*, 1837, ch. 824, § 5.
14. Section 385 of the Code of Procedure,—which authorizes the defendant to offer to allow judgment before verdict,—amended by adding: That in case the defendant shall set up a counter-claim in his answer to an amount greater than the plaintiff's claim, or sufficient to reduce the plaintiff's recovery below fifty dollars, then the plaintiff may serve upon the defendant an offer in writing to allow judgment to be taken against him for the amount specified, or to allow said counter-claim to the amount specified, with costs. If the defendant accept the offer, and give notice thereof in writing within ten days, he may enter judgment as above for the amount specified, if the offer entitle him to judgment, or the amount specified in said offer shall be allowed him in the trial of the action. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the defendant fail to recover a more favorable judgment, or to establish his counter-claim to a greater amount than is specified in such offer, he cannot recover costs, but must pay the plaintiff's costs from the time of the offer. 2 *Laws of 1866*, 1845, ch. 824, § 16.
15. Where the defendant, after service of an offer to allow the plaintiff to take judgment for a specified sum, and within the ten days allowed for the plaintiff's acceptance, served an answer and counter-claim demanding judgment of the plaintiff for a larger sum than the amount of the offer, and upon the trial the plaintiff recovered a few cents less than the defendant's offer;—*Held*, that he was nevertheless entitled to costs: for by the extinguishment of the counterclaim, he recovered a more favorable judgment. *Supreme Ct.*, *Tompkins v. Ives*, 30 *How. Pr.*, 13.
15. Judgment may be rendered against one defendant alone, in the marine court, in an action *ex delicto*, although section 136 of the Code does not apply to the marine court. *N. Y. Com. Pl.*, 1861, *Ballard v. Lockwood*, 1 *Daly*, 158.

JUSTICES' COURTS.

1. The plaintiffs brought an action before the justice of the peace, and complained for trespass *quare clausum fregit*, and treading down and destroying grass and herbage there growing, and treading down, eating up, and destroying corn, oats, wheat, apples, potatoes, and other grain and vegetables of the plaintiffs. The defendants answered by justifying "the acts of entering the close of the plaintiffs mentioned in the complaint," by averring a right of way across the *locus in quo*, by setting up other defences—of neglect to keep proper fences, license, and making a general denial "as to the residue of the acts complained of.—*Held*, that the defence of justification of entering the close went to the plaintiffs' entire right of recovery for the trespass charged, whatever other matters of defence were stated in the answer; and on the delivery to the justice, he was ousted of jurisdiction and was bound to discontinue the proceedings—not only as to one, or some of the alleged causes of action, but as to all, inasmuch as a defence of title to real property was interposed to all the trespasses charged in the complaints. *Supreme Ct.*, 1865, *Hall v. Hodskins*, 30 *How. Pr.*, 15.
2. A justice has power to amend a summons by correcting a clerical mistake in respect to the year named in it, which misled no one, and which was not discovered until after the cause was called and both the parties had appeared and answered before the justice. The statutes (2 Rev. Stat., 424, 225,) give the power of amendment to justices' courts which courts of record possess. *Supreme Ct.*, 1865, *Bradbury v. Van Nostrand*, 45 *Barb.*, 194.
3. It is well settled that notwithstanding the defendant in a suit before a justice of the peace, fails to appear at the trial, the plaintiff must establish his cause of action by legal evidence. [29 *Barb.*, 523; 20 *Id.*, 278.] *Supreme Ct.*, 1865, *Armstrong v. Smith*, 44 *Barb.*, 120.
4. The practice in regard to appeals from a justice's judgment to the county court, introduced by the act of 1862, amending § 371 of the Code of Procedure, stated. *Wynkoop v. Halbut*, 33 *Barb.*, 266.
5. Under section 371 of the Code, as amended by the act of 1862, where the party against whom judgment has been recovered in a justice's court appeals therefrom, claiming, in his notice of appeal, that the judgment should have been in his favor, and upon the appeal the respondent recovers judgment again, though for a less amount, the appellant is not entitled to costs, but the respondent is. Under such a notice the respondent is not entitled to serve an offer to reduce his judgment, and therefore is not chargeable with costs if it be merely reduced upon the appeal. *Supreme Ct.*, 1865, *Wynkoop v. Halbut*, 43 *Barb.*, 266.
6. Under the amendment of 1864 (Laws of 1864, 997, ch. 414, § 4) to section 371 of the Code of Procedure, providing that if, in a notice of appeal from a justice's court, the appellant shall not state in what particular the judgment should have been more favorable to him, the notice must show distinctly what the error of the justice really was, in language plain and explicit. A general statement that "judgment should not have been for a

- sum exceeding" a specified amount is not sufficient. This does not point to any particular error. [Reviewing 25 How. Pr., 144; Id., 158; 27 Id., 67; 29 Id., 232]. *Supreme Ct.*, 1865, *Gray v. Hannah*, *Ante*, 43. See to the contrary *Smith v. Hinds*, 30 *How. Pr.*, 187.
7. Under section 371 of the Code of Procedure, if a party appealing from a justice's judgment would entitle himself to costs, his notice of appeal must specify in plain and explicit language what the error or mistake of the justice really was. If the judgment was a recovery upon a single cause of action for unliquidated damages, a notice merely stating that the judgment should not have been for a sum exceeding a specified small amount, without pointing out any element in the damages that was erroneous, is not sufficient to entitle the appellant to costs. *Supreme Ct.*, 1866, *Gray v. Hannah*, *Ante*, 43.
 8. Under section 371 of the Code of Procedure, as amended, a notice of appeal from a justice's court, in order to charge the respondent with costs, must not merely object to the whole judgment, but must point out or particularize wherein the judgment should have been more favorable. It is not sufficient in this respect to state that the judgment was "excessive," or that there was no evidence to warrant a judgment for a sum exceeding a specified amount; or, that there was error in allowing a recovery for a specified thing, without saying how the judgment should be modified in this respect. *Supreme Ct.*, 1866, *Loveland v. Atwood*, 31 *How. Pr.*, 467.
 9. The provision of section 371 of the Code,—respecting the notice of appeal necessary to entitle the appellant to costs,—amended, by requiring that if he claims that the amount of judgment is less favorable to him than it should have been, he should state what should have been its amount; and adding a proviso that the appellant shall not recover costs unless the judgment appealed from shall be reversed on such appeal, or be made more favorable to him, to the amount of at least ten dollars. *2 Laws of 1866*, 1842, ch. 924, § 14.
 10. Where a notice of appeal from a justice's judgment, specifying the particulars in which the judgment should have been more favorable to the appellant, is served upon the respondent, the respondent in serving his *offer of acceptance*, must not only serve it upon the party, but also upon the justice. The statute has made the respondent's right to costs depend upon a compliance with its provisions. *Supreme Ct.*, *Gen. T.*, 1865, *Smith v. Hinds*, 30 *How. Pr.*, 187.
 11. The court to which an appeal is taken from a justice's court should not dismiss the appeal upon the objection that the notice was not stamped, as required by the United States Internal Revenue Law. *Chenango Co. Ct.*, 1866, *Lewis v. Randall*, *Ante*, 135.
 12. Where the appellant, in accordance with the provisions of section 352 of the Code, states in the notice of appeal that such appeal is taken upon questions of law only, the court below shall return to the appellate court the testimony, proceedings, and judgment. *2 Laws of 1866*, 1841, ch. 824, § 13, amending *Code of Pro.*, § 360.
 13. An offer by the respondent, on an appeal from a judgment in a justice's court, to reduce the amount of a recovery, is not admissible in evidence on the trial of the appeal in the county court for the purpose of influencing the

jury to the prejudice of the respondent's case. *N. Y. Supreme Ct.*, 1865, *Finney v. Veeder*, *Ante*, 366.

14. The Code of Procedure nowhere describes the precise form of the undertaking to be given upon an appeal from the judgment of a justice's court. An undertaking which substantially conforms to the directions of section 356 is sufficient. *Ct. of Appeals*, 1865, *Doolittle v. Dininay*, 31 *N. Y.*, 350.
15. The pendency of an appeal from a decision of a justice dismissing a complaint against the objection of the plaintiff, does not enable the plaintiff, in such action, when sued by the defendant in another court upon a cross demand, to set up that such cross demand ought to have been interposed as a set-off, and is barred by 2 Rev. Stat., 233, 236, § 57, because it was not so interposed. The erroneous dismissal of a suit by a justice of the peace, against the remonstrance of the plaintiff, puts an end to it, as effectually as though it was dismissed on the plaintiff's motion. And an appeal from the judgment of dismissal does not restore the action. *Supreme Ct.*, 1864, *Lord v. Ostrander*, 43 *Barb.*, 337.
16. A ruling that a witness was bound to answer a question, which he nevertheless refused, and was not compelled to answer, is not a ground for reversing a judgment which appears upon the merits to be free from error. Assuming the rule to be erroneous, it is a mere speculation to say that the ruling prejudiced the defendant in the minds of the jury, and produced the verdict against him, where there is no evidence that such its effect, in fact. The presumption is the other way, since it was the duty of the jury to base their verdict on the testimony alone. *Supreme Ct.*, 1865, *Murphy v. Tripp*, 44 *Barb.*, 189.
17. It is well established that in order to reverse proceedings of a justice court, proper objections must be there taken. Every reasonable intendment will be indulged in support of a judgment of that court. *Supreme Ct.*, 1865, *Duntz v. Duntz*, 44 *Barb.*, 459.
18. The rule that questions arising upon conflicting evidence must be left to the tribunal that hears the testimony, and sees the witness upon the stand, inflexible. *Reynolds v. Kelly*, 1 *Daly*, 283.
19. Where, on the trial of an action brought before the county court, on appeal from a justice's court, the plaintiff is nonsuited, he cannot appeal directly from the judgment of nonsuit to the supreme court; but must first move in the county court for a new trial; and procure the decision of that court upon the exceptions relied on. *Supreme Ct.*, IV. *Dist.*, 1864, *Simmons v. Sherman*, 4 *How. Pr.*, 4.*
20. That on appeal from a justice's court, where material, but incompetent evidence upon the issue was admitted, on the trial, the county court will not refuse to reverse on the ground there was other evidence sufficient and competent, to the same effect. *Columbia Co. Ct.*, 1866, *Decher v. Myers*, 31 *How. Pr.*, 372.

* Following the decision of the general term of the fifth district, in *Carter v. Wisner*, 27 *How. Pr.*, 385, and disapproving that of the general term in the sixth district, in *Monroe v. Monroe* (*Id.*, 208).

LIMITATION OF ACTIONS.

21. That the finding of a jury in a justice's court, on a question of fact, will not be reviewed on appeal to the county court, if the evidence was conflicting. *Ib.*

CERTIORARI, 10, 11: COSTS, 6: DISTRICT COURT OF THE CITY OF NEW YORK: FORMER ADJUDICATION, 2: MARINE COURT.

JUSTICE OF THE PEACE.

1. Towns which touch each other at the corners are "next adjoining" within the meaning of a statute giving jurisdiction of an action to any justice of a town next adjoining the residence of the plaintiff or defendant *Ct. of Appeals*, 1865, *Holmes v. Carley*, 31 N. Y., 289.
2. A justice of the peace in making a return on appeal, acts ministerially, and is liable in damages for a false return. *Supreme Ct.*, 1864, *MacDonnell v. Buffum*, 31 *How. Pr.*, 154.

LACHES.

The criterion of what is excuse for laches in practice, which is applicable to individuals generally, is not to be strictly applied to the law officer of a municipal corporation, to the prejudice of the rights of the public whose officer he is. In a clear case of excusable negligence and palpable error, the court may grant relief on terms, even after a delay which might bar the application of an ordinary suitor. *N. Y. Superior Ct., Sp. T.*, 1866, *Greer v. Mayor, &c., of New York*, *Ante*, 206.

LEGAL TENDER.

1. Under the Act of Congress of February 25, 1862 (12 U. S. Stat. at L., 711), making the notes issued by the United States "lawful money, and a legal tender in payment of all debts, public and private, within the United States;"—a contract for the payment of a sum in gold and silver dollars is satisfied by payment in such legal tender notes. *N. Y. Superior Ct.*, 1866, *Wilson v. Morgan*, *Ante*, 174.
2. A claim for the payment of freight is a debt of the consignor, within the meaning of the Act, and the consignee may discharge it by payment in such notes. *Ib.*

LEGATEES.

CAUSE OF ACTION, 3.

LIMITATION OF ACTIONS.

1. Under the Code, the period limited for the commencement of actions upon a judgment or decree in any court, is twenty years, and this includes judgments in the marine or justice's courts. *Supreme Ct.*, 1865, *Conger v. Vandewater*, *Ante*, 126.
2. An action brought against administrators, upon a promissory note by their intestate, although more than one year after the letters of administration

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are issued, but within six years (excluding in computing them the eighteen months immediately following the death of the intestate), after the note fell due, is not barred by the statute of limitations. *Supreme Ct.*, 1865, *Seovil v. Seovil*, 45 *Barb.*, 517; *S. C.*, 30 *How. Pr.*, 246.

3. A defendant in a personal action, who is resident abroad, cannot avail himself of the statute of limitations of this State until he has returned to, and actually been, a resident of this State, and subject to process of its courts, for the period prescribed by the statute. The *lex fori* governs all questions arising under the statutes of limitations of the various States of this country. [Story's *Conf. of L.*, § 577.] Hence, the courts of this State cannot give effect to the statute of limitations of another State, even in a case where both the plaintiff and defendant, at the time when the right of action accrued, were, and ever since have been, residents of such other State. [20 *N. Y.*, 224; 3 *Johns.*, 262; 7 *Mass.*, 516; 11 *Pick.*, 36.] *Supreme Ct.*, 1864, *Power v. Hathaway*, 43 *Barb.*, 214.
4. The time during which an injunction prevented the commencement of an action upon a premium note, deducted (under section 105 of the Code of Procedure) in computing the six years requisite to bar the action. *Ct. of Appeals*, 1865, *Sands v. Campbell*, 31 *N. Y.*, 345.
5. When the statute of limitations commences to run against the right of action, for contributions from one equitably interested in corporate stock, towards a payment made by the nonsuit stockholder upon corporate debts. *Stover v. Flack*, 30 *N. Y.*, 64; affirming *S. C.*, 41 *Barb.*, 162.
6. Under the statute of limitations of this State, in determining whether the action is barred, the only question is whether the defendant has been within the State, and amenable to process of its courts for six years before the commencement of the suit. If so, the statute is a complete defence, except in cases of special disabilities specified in section 101 of the Code of Procedure, in favor of the plaintiffs. Unless the plaintiff labor under some one of the disabilities specified in that section, he must commence his suit within the time limited in the statute, for the several causes of action therein mentioned, wherever he may chance to reside, whether a citizen of the United States, or an alien. *Supreme Ct.*, 1864, *Power v. Hathaway*, 43 *Barb.*, 114.
7. A condition annexed to a policy of insurance, that no suit or action against the insurers, for the recovery of any claim upon the policy, shall be sustainable in any court of law or chancery, unless commenced within six months next after any loss or damage shall have occurred, is valid; and if an action is not commenced within that time, it will be barred. *Ct. of Appeals*, 1864, *Ripley v. Etna Ins. Co.*, 30 *N. Y.*, 136; *Roach v. N. Y. & Erie Ins. Co.*, *Ib.*, 246.

ANSWER, 6, 7.

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NOTICE.

LOAN COMMISSIONERS.

A notice and sale of mortgaged premises by one only of the commissioners for loaning the public moneys, is a nullity. It is the *commissioners*, in their corporate capacity, who become, in case of default in payment of the loan, seized of the lands mortgaged to them; *they* are required to give notice and make the sale; and *they* only, under their seal of office, can convey to the purchaser. *So held*, although there was but one commissioner in office at the time. *Ct. of Appeals*, 1864, *York v. Allen*, 30 N. Y., 104.

MALICIOUS PROSECUTION.

An action for malicious prosecution will lie against a creditor who effected the arrest and imprisonment of his debtor by alleging that the demand was greater in amount than it truly was, so as to hinder the debtor from getting bail. It is true, that in order to sustain an action for malicious prosecution, the law requires that the proceedings which form the subject of complaint should have been maliciously instituted, and carried on, without any reasonable or probable cause; but there would ordinarily be but little difference in the injury produced to the defendant, whether the unfounded prosecution was carried on without any demand whatever to justify it, or whether it was coupled with a claim of real merit. So far as that part of the prosecution is considered, it is as wholly deprived of reasonable or probable cause, as it would be when made itself the sole subject of the suit. [Phil. on Ev., 3d ed., 261; 3 Barn. & Cress., 139; 5 Barn. & A., 313; 7 Eng. Com. Law, 177; Queen's Bench Rep., 152; affirmed on error, 172; 26 Eng. Law & Eq. Rep., 200; 4 Serg. & R., 19; 13 Id., 54.] *Supreme Ct.*, 1864, *Brown v. McIntyre*, 43 Barb., 344.

MANDAMUS.

1. Mandamus is not to be denied merely because the relator may have a remedy by action for damages. *Supreme Ct.*, 1865, *The People ex rel. Livingston v. Taylor*, *Ante*, 200.
2. A mandamus will not lie to compel the city judge of the city of New York to allow a *habeas corpus*. It is discretionary with him to allow the writ or not, in any case. *N. Y. Supreme Ct.*, 1866, *The People ex rel. Ryan v. Russel*, *Ante*, 230.
3. Authorized to be issued to enforce transfer of records to Metropolitan Health Commission. 1 *Laws of 1866*, 123, ch. 72, § 13.
4. A mandamus will lie to the commissioner of jurors, to compel him to strike off from the list of jurors the name of a person who is entitled, under the statute, to have his name stricken off. *Supreme Ct.*, 1865, *The People ex rel. Livingston v. Taylor*, *Ante*, 200.
5. Where a board of supervisors have a discretion to determine the proper amount to be allowed for services rendered to the county, and have once acted and exercised their discretion, a mandamus will not lie to compel

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- them to act further. *Supreme Ct., Sp. T.*, 1865, *People ex rel. Sherman v. Supervisors of St. Lawrence*, 30 *How. Pr.*, 173.
6. A mandamus will lie in behalf of a non-resident illegally assessed, to compel the assessors to strike the assessment from the assessment roll. *Supreme Ct., Sp. T.*, 1865, *The People v. Assessors of Town of Barton*, 44 *Barb.*, 148.
 7. Where the facts are undisputed, and both parties have been heard, upon an order to show cause why a peremptory mandamus should not issue, there is no occasion for an alternative writ, but the case is one for a peremptory writ to issue at once. [4 *Hill.*, 20.] *Supreme Ct., Sp. T.*, 1865, *The People v. Assessors of Town of Barton*, 44 *Barb.*, 148.
 8. In an action to try the title to an office in a municipal corporation, the supreme court, at special and general terms, having decided in favor of one party;—*Held*, that the fiscal officer of the municipal corporation was authorized in paying to the deputy of such party the moneys provided by law for the salary of such deputy. *Supreme Ct., Sp. T.*, 1865, *People v. Brennan*, *Ante*, 184. But compare *People ex rel. Dennis v. Brennan*, 30 *How. Pr.*, 417.
 9. Upon the court of last resort reversing such decision, and declaring the adverse party to be entitled, a mandamus will not lie at the suit of the deputy of the latter to compel payment, again, of the salary of the same period, to him, in the absence of any appropriation for the purpose. *Ib.*
 10. A mandamus lies to compel a gas company, manufacturing gas under the act of April 14, 1859 (Laws of 1859, 700, ch. 311, § 6), to supply gas to a relator who is entitled, under the statute, to receive it, and who offers to comply with the general conditions on which the company supplies others. *Supreme Ct.*, 1865, *People v. Manhattan Gas Light Co.*, *Ante*, 404.

MUNICIPAL CORPORATIONS, 2.

MARINE COURT (OF THE CITY OF NEW YORK).

1. By appearing and pleading to the merits, the defendants waive all objections to the form of summons. [2 *Hilt.*, 49.] *N. Y. Com. Pl.*, 1863, *Le Sage v. Great Western R. R. Co.*, 1 *Daly*, 306.
2. The general terms may be held by the justices of said court, or by any two of them, in case of the sickness or other inability of one. 2 *Laws of 1866*, 1501, ch. 701; amending *Laws of 1853*, ch. 617, § 5.
3. Judgment may be rendered against one defendant alone, in the marine court, in cases embraced by section 136 of the Code, although that section does not apply to the marine court. *N. Y. Com. Pl.*, 1861, *Ballard v. Lockwood*, 1 *Daly*, 158.
4. It is the duty of a judge of the marine court, presiding at a trial by a jury, to give judgment upon the verdict; and this judgment he cannot intermit or avoid by making an order for a new trial. *N. Y. Com. Pl.*, 1865, *Williams v. Tradesmen's Fire Ins. Co.*, 1 *Daly*, 437.
5. The general term of the marine court has the same power as the general term of the supreme court to correct entries of its own judgments and decisions. *N. Y. Com. Pl.*, 1865, *Harper v. Hall*, 1 *Daly*, 498.

MECHANIC'S LIEN.

6. There is no provision of law allowing a single judge of the marine court to hear a motion for a new trial, or providing for an appeal in that court from an order either granting or denying such a motion. *N. Y. Com. Pl.*, 1865, *Williams v. Tradesmen's Fire Ins. Co.*, 1 *Daly*, 437.
7. On a motion before the general term of the marine court to dismiss an appeal thereto, for want of prosecution, an order was erroneously entered affirming the judgment appealed from.—*Held*, that the general term might on motion, correct such order, so as to make it conform to the real decision of the court. *N. Y. Com. Pl.*, 1865, *Harper v. Hall*, 1 *Daly*, 498.
8. The act of 1853 (chap. 617, § 5),—directing the mode of appeal to the general term of the marine court,—makes sections 348 and 335 of the Code of Procedure applicable to appeals in that court. *Ct. of Appeals*, 1865, *Robert v. Donnell*, *Ante*, 4.
9. An order of the general term of the marine court, dismissing an appeal thereto for want of prosecution, is not a final determination, from which an appeal can be taken to the common pleas. *N. Y. Com. Pl.*, 1865, *Harper v. Hall*, 1 *Daly*, 498.
10. The reversal of a judgment upon the ground that it is against the weight of evidence, and an order for a new trial by the general term of the marine court, constitute a final determination, from which an appeal may be taken to the common pleas. *N. Y. Com. Pl.*, 1865, *Williams v. Tradesmen's Fire Ins. Co.*, 1 *Daly*, 437.
11. The court of common pleas may, at special term, dismiss an appeal from the general term of the marine court for irregularity. But if the proceedings are regular, the appeal must be heard at the general term, even upon a question of jurisdiction. *N. Y. Com. Pl.*, 1863, *Williams v. Tradesmen's Fire Ins. Co.*, 1 *Daly*, 322.
12. The appellate court will permit an amendment by which an appeal from the marine court may be perfected, when notice of appeal has been served. *N. Y. Com. Pl.*, 1863, *Williams v. Tradesmen's Fire Ins. Co.*, 1 *Daly*, 322.

APPEAL, 44: JUDGMENT, 15: VERIFICATION, 2.

MARRIED WOMEN.

PARTIES, 3, 4.

MECHANIC'S LIEN.

1. Where a sub-contractor is prevented from performing the whole of his contract with the contractor by reason of the insolvency of the latter, and an assignment by him of the contract, for the benefit of his creditors, he may acquire and enforce a lien for the value of his labor and materials performed and furnished up to the time when he was prevented. [1 *E. D. Smith*, 213; 4 *Id.*, 729.] *N. Y. Com. Pl.*, 1863, *Henderson v. Sturgis*, 1 *Daly*, 336.
2. Thus where although at the time the sub-contractor filed his lien in such a case, there was nothing due to the contractor, yet the latter having

made an assignment with the consent of the owner, who detained from the contract price the amount of the lien, and the sub-contractor having, under an agreement with the assignee, completed his work as contemplated by the original contract;—*Held*, that the equities were with the sub-contractor, and the court should apply the sum so detained in satisfaction of his lien. *Id.*

3. But it is otherwise where, prior to the filing of a notice claiming a mechanic's lien by a sub-contractor, the contractor, in good faith and for a full consideration, transfers to a purchaser the right that he might thereafter acquire to any payments under the contract. In such a case, the purchaser succeeds to the rights of the contractor upon the contract, and as against such purchaser, the sub-contractor, who knew, at the time of making his contract, of the existence of the assignment, acquires no lien. *N. Y. Com. Pl.*, 1863, *Cakes v. Haley*, 1 *Daly*, 338.
4. Where the notice of lien under the mechanic's lien law stated that the materials were furnished in pursuance of a written contract;—*Held*, that extra materials which became necessary in consequence of defects in the specifications of the written contract, were covered by the notice. *N. Y. Com. Pl.*, 1859, *McAuley v. Mildrum*, 1 *Daly*, 396.
5. Where the legal title to land is in one of two persons who has verbally agreed to divide it with another, and they take separate possession of their respective portions, and the latter contracts with a mechanic to erect a dwelling house on his part, which is built accordingly, the interest of the party so contracting is of such a nature as to make it the subject of a lien under the mechanic's lien law, although the title to the whole lot is in the co-tenant. In such a case it is proper to apply the rule that a parol partition between tenants in common, accompanied by actual possession in accordance therewith, will bind the parties and those claiming through or from them; and the co-tenant, who is not a party to the contract with the mechanic, and who has no interest in the work done, is not liable under the contract; nor is his share of the property subject to the builder's lien. *Supreme Ct.*, 1865, *Otis v. Cusack*, 43 *Barb.*, 546.
6. The lien to be obtained under *Laws of 1863*, 859, ch. 500, which secures the payment of "mechanics, laborers, and all persons furnishing materials towards the erection, altering or repairing of buildings in the city of New York,"—restricted to the extent of all the right, title and interest which the owner shall have therein at the time of filing the notice of lien required by the sixth section of said act. *Laws of 1863*, 1634, ch. 752.
7. In an action brought by a sub-contractor to enforce a lien claimed to have been acquired under the mechanic's lien law of 1851, it must appear by the complaint, 1. That labor and materials have been furnished in the erection of the building, in conformity with the contract made by the original contractor with the owner. 2. That within six months thereafter, a notice in writing, under section 6 of the act, claiming a lien for work or materials thus furnished, has been filed with the county clerk. 3. That at or since the time of filing the notice of lien, a payment was or is due from the owner to the contractor upon the original contract. 4. That the contracting owner had some interest in the property at the time the notice claiming the relief was filed. [4 *E. D. Smith*, 719; *Id.*, 721; *Id.*, 729;

MORTGAGE.

Id., 760; 3 Id., 632; Id., 650; Id., 662; 2 Id., 616; Id., 689; Id., 556; 1 Id., 625; Id., 681.] *N. Y. Com. Pl.*, 1859, *Bailey v. Johnson*, 1 *Daly*, 61.

8. The mechanic's lien law of 1864, for Onondaga county, amended by adding at the end of section 2 the following words: "When such labor or material is performed or furnished to a contractor or sub-contractor, all payments made by the owner to either, in good faith, to apply on his contract, shall operate to extinguish the lien aforesaid, unless written notice of the lien is served on the owner of the premises before such payment, stating that the same is then, or immediately thereafter will be claimed. When the owner is compelled to discharge liens under this act, he shall have the right to deduct the amount of the same from the contract price of the contractor or sub-contractor, for whom the labor was performed or material furnished. 2 *Laws of 1866*, ch. 788, § 1.

9. Where, under a single contract, the lienor had furnished materials to the owner, equally for seven houses, and one of such houses had been conveyed away by the owner before the filing of the notice of lien;—*Held*, that the lien was valid as a lien upon the remaining six houses, only for their proportionate part of the whole claim (six-sevenths), although some payments had been made by the owner on general account. [4 *E. D. Smith*, 734.] *N. Y. Com. Pl.*, 1859, *McAuley v. Mildrum*, 1 *Daly*, 396.

Costs, 15.

MILITARY LAW.

COURTS-MARTIAL.

MISTAKE.

Under an agreement to secure a debt by mortgage, with notes which both parties understood were intended to bear interest, the debtor intentionally omitted the words "with interest," from the later notes, and the creditor, looking only at the earlier, accepted all the notes without noticing the omission;—*Held*, that the creditor was entitled to relief in equity against this mistake. The rule of equity that relief is to be confined to cases of mutual mistake, is not to be understood as requiring it to be shown that both parties were ignorant of the error. *Supreme Ct.*, 1866, *Botsford v. McLean*,* 45 *Barb.*, 478.

MORTGAGE.

1. A mortgage is a mere security for a debt; and there is no such relation of trust or confidence between the maker and holder of a mortgage as prevents the latter from acquiring title to its subject-matter, either under his own, or any other valid lien. The mortgagee has no duty to perform to the mortgagor, or toward the mortgaged premises, that precludes him from buying the premises at a tax sale. He may pay the taxes or not, as he chooses, or stand upon his general rights, and purchase at the tax sale, as others could do, for the purposes of investment or protection. *Ct. of Appeals*, 1865, *Williams v. Townsend*, 31 *N. Y.*, 411.

* Compare a previous decision in *S. C.*, 42 *Id.*, 445, in which it was *Held*, that the evidence was not sufficient to sustain judgment for the relief sought.

MOTIONS AND ORDERS.

2. A mortgagee who desires to pay off taxes or assessments, and charge them on the mortgaged premises, has a very plain course to pursue. At any stage of the proceedings he can step forward in his character of mortgagee and pay the assessment, or redeem from a sale before the purchaser's title has actually ripened, by a conveyance under the law. It is no hardship to require him to do this in a plain and distinct manner, so as not to embarrass the title of the mortgagor or owner. When, however, he purchases at a tax-sale, and takes a certificate as purchaser, that is an election on his part to occupy the relation of purchaser, with all the rights and incidents which the law attaches to it. He becomes then the owner of an undischarged lien, which the owner of the land may discharge in the manner provided by law. *Ib.*

MOTIONS AND ORDERS.

1. An application to the favor of the court should not be denied on the ground that the moving party is in contempt of another court. *N. Y. Superior Ct., Sp. T., 1866, Strong v. Strong, Ante, 358.*
2. It is not generally essential that the defendant, in moving to compel the plaintiff to reply to an answer of the statute of limitations, should state that he does not know the ground on which the plaintiff intends to rely to defeat the bar of the statute. *Supreme Ct., Sp. T., 1865, Hubbell v. Fowler, Ante, 1.*
3. That an order is the only mode of judicially determining a motion. A mere oral decision is of no avail without an order making it a record; nor should the court rely on affidavits of parties as to what a court has decided; even counsel being sometimes mistaken. *N. Y. Superior Ct., 1864, Smith v. Spalding, 30 How. Pr., 339.*
4. The objection that the assessors have assessed property for a local improvement in the city of New York more than is allowed by law, may be raised for the first time before the supreme court on a motion to vacate the assessment. *Supreme Ct., Sp. T., 1865, Palmer's Petition, Ante, 30.*
5. Defendants not entitled to a bill of particulars in an action for damages for the breach of a special contract for services. *Supreme Ct., Sp. T., 1865, Ives v. McCredy, 31 How. Pr., 54.*
6. Motion to discharge an order of arrest denied, on the ground that the moving affidavit of the defendant was sufficiently contradicted by that of a disinterested witness for the plaintiffs. *Butler v. McIlvaine, 31 How. Pr., 379.*

Consult also ARREST.

7. An application to be relieved from payment of alimony, if made after imprisonment under attachment for non-payment, should be made under 2 *Rev. Stat.*, 538, § 20. *N. Y. Superior Ct., Sp. T., 1866, Graley v. Graley, 31 How. Pr., 475.*

APPEAL, 42: CONFESSION OF JUDGMENT, 10: PLEADING, 33-35.

MUNICIPAL CORPORATIONS.

1. Under a statute (*Laws of 1865*, ch. 180), making it the duty of a municipal corporation to create a stock or fund to an amount, and upon terms of payment, fixed in the statute, and requiring the comptroller of the corporation to prepare and issue the stock, and sell the same,—the corporation have a duty to perform in creating the stock by ordinance, before the comptroller can issue it. *Supreme Ct.*, 1866, *The People ex rel. The Market Commissioners v. The Common Council*, *Ante*, 318.
2. A mandamus to compel the corporation to create the stock, is properly addressed to the common council, although the corporation are designated in the statute as the Mayor, Aldermen, and Commonalty of the city. *Ib.*

CAUSE OF ACTION, 4: POWERS.

NEGLIGENCE.

One who reserves a right of possession and use in a pier, though he has parted with the title, is still liable for injuries caused by its bad condition. *N. Y. Com. Pl.*, 1865, *Cannavan v. Conklin*, *Ante*, 271.

NEW TRIAL.

1. The Code of Procedure has not taken away from the mayor's court of the city of Albany the power to grant new trials, or to set aside a judgment on the merits entered on the report of a referee. *Supreme Ct.*, 1864, *People v. Austin*, 43 *Barb.*, 313.
2. The county court has authority, by section 30, subd. 13, of the Code, to review its proceedings in an action after judgment, and to grant a new trial, &c., notwithstanding the general language of section 323 of the Code, providing that the only mode of reviewing the judgment or order, in a civil action, shall be by appeal. *Otsego Co. Ct.*, 1865, *Hall v. Hall*, 30 *How. Pr.*, 51.
3. Although a new trial will not be granted on evidence merely contradicting the testimony on which the verdict proceeded, discovered subsequent to the trial, yet where the facts, on which the witnesses for the prevailing parties founded themselves, are falsified by the affidavits produced on the motion, it affords a sufficient ground for ordering a new trial. [1 *Bos. & P.*, 429.] *N. Y. Com. Pl.*, 1860, *Wehrkamp v. Willet*, 1 *Daly*, 4.
4. In an action by a married woman against the sheriff for taking certain personal property, claimed by her to be her separate estate, upon a judgment and execution against her husband,—*Held*, that her testimony on the trial tending to show her ability to purchase the property claimed, with moneys of her own, and independent of her husband, was material to the issue; and clear proof by affidavit, on a motion for a new trial, that her testimony on that point was false, was sufficient ground for granting a new trial. *Ib.*

- 5 If it be shown by the affidavits of jurors that the officer having them in charge made statements calculated to influence the jury to render the verdict, it is sufficient for granting a new trial. It is not necessary to show that the verdict was in fact influenced by the statements of the officer. It is enough to show that there is reason to suspect that the statements were made, and if made, that they were likely, or calculated to influence the verdict. [1 Hill, 211; 17 Mass. R., 318; 3 Brod. & Bing., 257; C. L. Rep., 433.] *Supreme Ct., Sp. T.*, 1865, *Thomas v. Chapman*, 45 *Barb.*, 98.
6. Although affidavits of jurors will not be received to show their own misconduct, or the misconduct of their fellows [5 Hill, 650], there is no doubt that they are admissible to show the misconduct of a party, or of the officer having charge of them. [9 How. Pr., 7.] *Supreme Ct., Sp. T.*, 1865, *Thomas v. Chapman*, 45 *Barb.*, 98.
7. Where, in an action upon a promissory note, the defence was payment, and the defendant, being examined as a witness, testified positively to the payment of the note, and to the particular time, manner and place of payment, and the person to whom made; and the plaintiff, who was a banker, on a motion for a new trial, swore that this testimony took him by surprise; that he did not previously know how, when or where, it was claimed that the note was paid; and it appearing that to meet and explain such evidence by countervailing testimony, at the trial, required time to inspect entries and examine dates, &c.; and that since the trial it had been discovered that three witnesses would contradict the defendant's testimony, as to the fact of payment, on the day and at the place mentioned by him, and would testify to their presence, and to what did take place then and there;—*Held*, that this was a proper case for granting a new trial on the grounds of *surprise* and *newly discovered evidence*. So far as defendant was concerned, it was a single transaction, and likely to be remembered if true, while in respect to plaintiff it was one of numerous business transactions, not likely to be remembered by himself or his clerk. *Supreme Ct.*, 1864, *Parshall v. Klinck*, 43 *Barb.*, 203.
8. In an action against the drawer of a bank check, the defence being that it was given for the benefit of a third person, on an agreement that it was to be paid only out of funds to be provided by him, the plaintiff testified that before he took the check the defendant told him that he had security, and would pay the check, and that he (plaintiff) took it for value. The defendant testified that he never had any conversation with plaintiff before the latter received the check. After verdict for the plaintiff;—*Held*, that newly discovered evidence of declarations of the plaintiff that he knew before he took the check that it was made on the condition alleged by the defendant, was a good ground for granting a new trial. *N. Y. Superior Ct.*, 1863, *Oakley v. Sears*, *Ante*, 368.
9. The circumstance that proof of such facts would tend to discredit the plaintiff, does not convert the evidence into mere impeaching evidence. *Ib.*
10. Nor is such evidence to be deemed cumulative, but is direct and independent testimony. *Ib.*
11. An application for a new trial upon newly discovered evidence denied, where the evidence was cumulative, was the mere opinion of a witness,

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- and went to impeach or to contradict the testimony of the prosecutor. *Williams v. People*, 45 *Barb.*, 201.
12. Evidence proposed to be given to prove *new facts* not proved on the former trial, is not therefore subject to the objection that it is cumulative. *Supreme Ct.*, 1864, *Parshall v. Klinck*, 43 *Barb.*, 203.
13. The statute as to the mode in which jurors are to be drawn is directory; and a neglect to conform to its provisions is not, in itself, a sufficient ground for setting aside a verdict where the prisoner has not been prejudiced. *Supreme Ct.*, 1865, *People v. Ferris*, *Ante*, 193.
14. A new trial is not to be granted to the defendants after a verdict against them for an amount less than that claimed by the plaintiff, on the ground that its being for less than the full amount claimed, indicates that the jury should have found for the defendants, if, upon the same evidence, a verdict for the full amount would not have been set aside. Even if the verdict was the result of a compromise of opinions on the part of the jurors; some being of opinion that the defence was established, and others that it was not, and the verdict is not what either of them alone would have rendered, and is not, in amount, the logical result of any possible findings, it is not, for that reason, to be set aside. *Supreme Ct.*, 1864, *Wolf v. Goodhue Fire Insurance Company*, 43 *Barb.*, 400.
15. The rule that the court will not grant a new trial when the plaintiff is only entitled to recover nominal damages, does not apply in cases where the jury would not have been limited to mere nominal damages, and if they had given damages for an amount sufficient to entitle the plaintiff to recover full costs, or a larger amount, within reasonable limits, the courts would not have set aside the verdict. *Supreme Ct.*, 1865, *McIntyre v. New York Central Railroad Company*, 43 *Barb.*, 532.
16. A verdict assessed upon a plainly erroneous method of computation of the value of a life estate may be set aside on the ground of mistake, inadvertence, or excusable neglect, even after a motion for a new trial has been denied, and judgment has been entered. *N. Y. Superior Ct.*, *Sp. T.*, 1866, *Greer v. The Mayor, &c., of New York*, *Ante*, 206.
17. Of the terms on which new trials should be granted in cases of newly discovered evidence. *Parshall v. Klinck*, 43 *Barb.*, 203.
- APPEAL, 20, 22: DISTRICT COURT OF NEW YORK, 5: JUSTICES' COURTS, 19: MARINE COURT, 4, 6: TRIAL.

NEW YORK, (CITY OF.)

1. The proviso in the act of April 3, 1807,—by which it is declared that the proprietors of lands adjacent shall have the pre-emptive right in all grants made by the corporation of the city of New York, of the lands under water in the Hudson river granted to the city by that Act,—is a mere restraint on alienation, which can be waived by the original grantors, the State; and does not confer any legal right to, or interest in, such lands under water, upon the proprietors of the adjacent uplands. *N. Y. Superior Ct.*, 1863, *Towle v. Palmer*, *Ante*, 81.
2. Special proceedings in reference to unsafe buildings. 2 *Laws of 1866*, 2033, ch. 873, § 40.

NOTICE.

3. A proceeding commenced before a judge under the Act of 1858, authorizing assessments to be set aside, cannot be transferred by the judge into court; and orders of court made in such proceeding, are without jurisdiction, and void. *Supreme Ct.*, 1865, *People v. Bowman*, 45 *Barb.*, 344.
4. An assessment for the expenses of a local improvement in the city of New York will not be set aside as fraudulent or irregular, merely because made before the work has been done. In such case, an estimate of the expenses being necessary, the assessors are authorized to make it, though not specially directed to do so in the ordinance. [2 *Sandf.*, 342; 8 *N. Y.*, 120.] *Supreme Ct.*, 1866, *Beekman's Petition*, *Ante*, 449; overruling in effect, a previous decision on this point in 19 *Abb. Pr.*, 245.
5. The city judge of the city of New York has power to allow a *habeas corpus*, but it is discretionary with him to allow the writ or not, in any case; and a mandamus will not lie to compel him to allow it. *Supreme Ct.*, 1866, *People v. Russell*, *Ante*, 230.

CAUSE OF ACTION, 19: COMPLAINT, 4: COURTS, 3: COURTS OF SPECIAL SESSIONS: DISMISSAL OF COMPLAINT, 3: MOTIONS AND ORDERS, 4: POWERS.

NONSUIT.

In an action by the personal representatives to recover damages upon the death of the decedent, resulting from the act or neglect of the defendant, it is error to nonsuit the plaintiff on the ground that special proof of pecuniary loss is not given [14 *N. Y.*, 310; 15 *Id.*, 434]; and the nonsuit will be set aside if the evidence is such that a recovery for anything more than nominal damages would not be set aside. *Supreme Ct.*, 1865, *McIntyre v. New York Central Railroad Company*, 43 *Barb.*, 532.

PARTIES, 21.

NOTICE.

1. The published notice of an order to creditors to show cause, stating that the proceeding is for the discharge of an insolvent from his debts, need not specify the particular statute under which it is had; and adding a defective reference to the statute does not vitiate. *N. Y. Superior Ct.*, 1863, *Soule v. Chase*, *Ante*, 48.
2. The proof of publication of such notice is not limited by the statute, to an affidavit of the printer or the clerk or foreman of the printer, although it enables the insolvent to perpetuate the evidence by taking their affidavit. *Ib.*
3. Certificate of the service of a notice of protest stating that the notice addressed to the indorser was left at his desk in the New York Custom House, he being absent therefrom, with a person in charge, is presumptively sufficient, in the absence of any proof to the contrary; and *it seems*, that such service would be sufficient as having been made at the indorser's place of business. *Supreme Ct.*, 1866, *Bank of the Commonwealth v. Mudgett*, 45 *Barb.*, 653.
4. Notice of unsafe buildings in city of New York, may be filed so as to create a lien, as a *lis pendens*. 2 *Laws of 1866*, 2030, ch. 873, § 36.

NUISANCES.

5. A statute which requires notice to be given by a board of commissioners, is not fulfilled by a notice given by the *president* of the board in his own name. *So held*, where it appeared that while the board verbally ordered a notice to be given by the president, they did not verbally or otherwise prescribe the form of notice. *Ct. of Appeals*, 1864, *Commissioners of Pilots v. Vanderbilt*, 31 *N. Y.*, 265.
6. Proof that a notice was "published in the *New York Day Book*" is sufficient to show compliance with an order that it be published in "the news paper published in the city of New York, entitled '*the Evening Day Book*,'" in the absence of any evidence of the existence of two papers with the title of *Day Book*. *N. Y. Superior Ct.*, 1863, *Soule v. Chase*, *Ante*, 48.
7. The provision of section 132 of the Code of Procedure,—which allows a notice of pendency of action to be filed in actions affecting real property, or where attachments are issued,—amended by allowing also a defendant, when he sets up an affirmative cause of action in his answer, and demands substantive relief, at the time of filing his answer, or at any time afterwards, to file a similar notice. 2 *Laws of 1866*, 1836, ch. 824, § 4.
8. The last clause of the same section, relative to cancelling the notice, amended to read as follows: And the court in which the said action "was commenced, may, in its discretion, at any time after the action shall be *settled, discontinued or abated*, as is provided in section number one hundred and twenty-one, on application of any person aggrieved, and on good cause shown, and on such notice as shall be directed or approved by the court, order the notice authorized by this section to be cancelled of record by the clerk of any county in whose office the same may have been filed or recorded; and such cancellation shall be made by an indorsement to that effect on the margin of the record, which shall refer to the order, and for which the clerk shall be entitled to a fee of twenty-five cents.* 2 *Laws of 1866*, 1837, ch. 824, § 4.

APPEAL, 1, 2, 43: LOAN COMMISSIONERS: MECHANICS' LIEN, 4: TRIAL, 1, 2.

OFFER TO ALLOW JUDGMENT.

What constitutes a "more favorable judgment" than the one offered.

Turner v. Hensinger, 31 *How. Pr.*, 66; *Reed v. Moore*, 31 *How. Pr.*, 264.

COSTS, 4, 5: JUDGMENT, 13, 14.

NUISANCES.

Stalls annexed to the markets in the city of New York, are not so clearly public nuisances, that the board of health may remove them; and the court may forbid their doing so by injunction. The rule that an injunction cannot be allowed where there is a remedy in damages, is not applicable where the loss in any event must fall on the public treasury. *Supreme Ct., Sp. T.*, 1866, *Hoffman v. Schultz*, 31 *How. Pr.*, 385.

* The amendment consists in substituting the words "was commenced" instead of "is pending;" inserting the words italicised above; and by requiring notice of the application to cancel, and prescribing the mode of cancellation.

PARTIES.

OFFICER.

1. Special provisions relative to the removal from office of members of the Metropolitan Board of Health. 1 *Laws of 1866*, 118, ch. 74, § 9.
2. Persons resisting orders issued under the Metropolitan Sanitary Act, may be arrested as for a misdemeanor. 1 *Laws of 1866*, 129, ch. 72, § 14, subd. 2.
3. In all cases where the governor is or may be authorized by law to remove officers, he may direct the testimony to be taken before himself, or before a commissioner appointed by him for that purpose, with the same effect, as the same may now be taken and had before a county judge, and may appoint such commissioner, and supercede any such appointment, and appoint a new commissioner whenever it shall appear necessary. 2 *Laws of 1866*, 1353, ch. 629, § 1.
4. The governor may direct the district attorney of the county where the officer sought to be removed may reside, or the attorney general, to conduct the inquiry and examination, and the same shall be had at such place in the county where the officer sought to be removed, shall reside, as shall be fixed by the governor or commissioners, and said inquiry and examination shall be upon like notice, and with the same means of procuring evidence, as now provided by law in such cases before a county judge. The governor and commissioners may enforce obedience to subpoenas, &c. In case such inquiry and examination shall be had before such commissioners, the same shall be taken and certified, and transmitted to the governor, as if taken before a county judge. *Id.*, §§ 2, 3.
5. Appointment of criers for courts of record, regulated. 2 *Laws of 1866*, 1257, ch. 583.

MANDAMUS, 8, 9: PARTIES, 15, 16.

PARTIES.

1. Upon a policy of insurance against fire, issued to A., loss, if any, payable to B., the latter may maintain an action in his own name. *Supreme Ct.*, 1865, *Frink v. Hampden Ins. Co.*, *Ante*, 343.
2. The cases of *Grosvenor v. Atlantic Fire Ins. Co.* (17 N. Y., 391); *Freeman v. The Fulton Fire Ins. Co.* (14 *Abb. Pr.*, 398); and *Fowler v. New York Indemnity Ins. Co.* (26 N. Y., 425), explained. *Id.*
3. A married woman having a right under the statute of 1860 (*Laws of 1860* ch. 66, § 2), to keep a boarding-house on her own account, and consequently to employ servants, for any injury to her servant, *per quod servitium amisit*, a right of action accrues to the wife, equally as if she were unmarried: that being a necessary incident to the right to carry on business on her own account. Hence, for seducing and debauching her servant, followed by a loss of service, she may sue in her own name, without joining her husband with her. *Supreme Ct.*, 1865, *Badgley v. Decker*, 44 *Barb.*, 577.
4. Under the act of 1849, p. 528, a married woman may hire premises in her own name; and she may maintain an action in her own name for a trespass thereon [16 N. Y., 71; *Code of Pro.*, § 114; *Laws of 1860*, 158, § 7.] *N. Y. Com. Pl.*, 1862, *Fox v. Duff*, 1 *Daly*, 196.
5. An action by a grantee of land, where the grants are void by reason of an actual adverse possession, may be maintained in the name of the grantor, or his or her heirs or legal representatives. *Code of Pro.*, § 111, second clause, as amended by 2 *Laws of 1866*, 1836, ch. 824.

PARTIES.

6. Where at common law the suit would have to be brought in the name of the trustee, for the benefit of the *cestui que trust*, while in equity it might be brought directly by the latter—the equitable form is to be preferred, in suing under the Code of Procedure, by which distinctions in the form of action are abolished. *N. Y. Com. Pl.*, 1866, *Grinnell v. Buchanan*, 1 *Daly*, 538.
7. Where the title to property owned by several persons jointly is held, for business convenience, in the name of one of the owners, who sells the property in his own name, but for the benefit of all, executing a bill of sale in his individual name, the contract enures for the joint benefit of all the owners ; and under section 111 of the Code of Procedure,—which provides that all actions shall be brought in the name of the real party in interest,—all may sue upon it, although the purchaser was ignorant of the fact that any other persons than the one with whom he contracted were interested in the property. *Supreme Ct.*, 1865, *Silliman v. Tuttle*, 45 *Barb.*, 171.
8. A participation in the profits of the business by a party as a compensation for his labor or services, without having an interest in the principal stock, or in the profits as such, or any right to control the business, does not make him a partner, within the rule that partners must all join in bringing an action. He must have an interest in the stock, with a right to control, and thus have a right to the profits as the result of the capital and industry in which all concerned are interested, and not as a measure of compensation merely, and must be liable for losses. [4 *Sandf.*, 311 ; 2 *Comst.*, 132 ; *Collyer on Part.*, §§ 25, 45, and notes, 3d *Am. Ed.* ; *Story on Part.*, § 30.] *Supreme Ct.*, 1864, *Conklin v. Barton*, 43 *Barb.*, 435.
9. Where the consideration of a *bond* proceeds from a third party, who is acting in the name, and for the benefit of the obligee thereof, such obligee is a party to the contract in such a sense as to be entitled to the proper remedies to reform or to collect the same. *Ct. of Appeals*, 1865, *Nevius v. Dunlap*, 33 *N. Y.*, 676.
10. One of numerous policy-holders in an insurance company, belonging to a class of policy-holders entitled to participate in profits, may maintain an action on his own behalf, and on the behalf of other shareholders who are interested with himself in the same question, and who may elect to come in and contribute to the expense of the action, to compel the officers of the company to make a just apportionment of profits. But this can only be done so far as the contracts are of the same character. The action cannot embrace those who have no community of interests with the plaintiffs, or who by contract or circumstances occupy a different position from the plaintiff. *Supreme Ct., Sp. T.*, 1865, *Luling v. Atlantic Mut. Ins. Co.*, 45 *Barb.*, 510 ; *S. C.*, 30 *How. Pr.*, 69.
11. Where several legatees, entitled to a sum of money bequeathed to them in equal shares, join in a power of attorney to another person, authorizing him to collect for them their respective legacies, each legatee may maintain an action in severalty, against the attorney, to recover the amount of his legacy. Their claims are several, and not joint ; and each was entitled

- to payment from the defendant, when the latter received the money. *Supreme Ct.*, 1864, *Power v. Hathaway*, 43 *Barb.*, 214.
12. Section 434 of the Code of Procedure,—authorizing the name of a relator to be joined with that of the people,—amended by adding that in every such case the attorney general may require, as a condition for bringing such action, that satisfactory security shall be given to indemnify the people of the State against the costs and expenses to be incurred thereby. 2 *Laws of 1866*, 1847, ch. 824, § 18.
 13. Several freeholders and tax-payers of a town cannot unite as plaintiffs in a suit in equity to enjoin the assessment of a tax, which, though it would be a lien upon their respective lands, would not affect any common property owned by them. [15 *Barb.*, 375.] *Supreme Ct.*, 1865, *Magee v. Cutler*, 43 *Barb.*, 239.
 14. Where, by articles of association between owners of real property, uniting for the purpose of its general improvement, each of the associates severally bound himself to pay a ratable proportion of all expenditures for the improvements made and about to be made;—*Held*, that an action to recover payment of the share of expense due from one member was properly brought by the other members of the association. *Supreme Ct.*, 1864, *Troy Iron and Nail Factory v. Corning*, 45 *Barb.*, 231.
 15. A minister plenipotentiary of a foreign power is not exempt from the application of the mechanic's lien law of this State, as to any house or building which is not used as a mansion for purposes connected with his representative character; and where exemption is claimed, it must appear by the proof that he is entitled to a suspension of the rule that the *lex rei sitæ* controls, respecting real property. *N. Y. Com. Pl.*, 1863, *Byrne v. Herran*, 1 *Daly*, 344.
 16. When a county is to be sued, the action must be against the board of supervisors. An action against the individual members cannot be sustained. [10 *Wend.*, 383; 19 *Id.*, 102; 5 *Den.*, 517; 9 *How. Pr.*, 316.] *Supreme Ct.*, 1864, *Magee v. Cutler*, 43 *Barb.*, 239.
 17. Where, in a creditor's action, the judgment debtors were not joined as defendants, but it appears in the proceedings in the case, that they have, by stipulation, consented to be bound by the judgment, and relinquished all title and claim in the subject-matter of the action, the court is at liberty to go on, without their presence, to final judgment, as against the defendants named in the pleadings. [3 *Russ*, 34; 11 *Paige*, 147.] *Supreme Ct.*, 1869, *Cowing v. Greene*, 45 *Barb.*, 585.
 18. To sustain a demurrer for non-joinder of defendants, it must appear that the party demurring has an interest in having the omitted party made defendant; that he is in some way prejudiced by the omission. *Supreme Ct.*, 1865, *Stockwell v. Wager*, 30 *How. Pr.*, 271.
 19. Where the complaint charged that the defendant, after the death of his wife, fraudulently procured the foreclosure of a mortgage by himself and wife on premises owned by his wife as her separate estate, and through the agency and instrumentality of other persons procured the title to the premises under the foreclosure in his own name, upon which he subsequently gave a mortgage to another person, and the plaintiffs claimed relief as heirs-at-law of defendant's wife, that the title of the premises be

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- declared to be in the plaintiffs, and subject to the last mortgage given by the defendant;—*Held*, that a demurrer for the non-joinder, as defendants, of the persons through whose instrumentality the defendant procured title to the premises, and his mortgagee, would not lie. The defendant had no interest that required these persons to be made defendants, nor could he be prejudiced by the omission to make them parties, or his case improved by making them parties. The interest of the mortgagee was protected by the relief demanded in the complaint, and the other persons could not be necessary to enable the defendant to establish a *bona fides* if he had one, or to assist him in answering for a fraud of which he was alone charged. *Ib.*
20. The rule that a dormant partner need not be joined as a defendant with the ostensible members of the firm, is not confined to persons whose connection with the firm is absolutely unknown. *Ct. of Appeals*, 1864, *North v. Bloss*, 30 N. Y., 374.
21. In an action against the owners of a vessel for supplies furnished her, where only one of the defendants was served, and it did not appear by the evidence that the other defendants were part owners;—*Held*, that there was a misjoinder of parties defendant, which the defendant served was entitled to take advantage of at the trial, and his motion for a nonsuit should be granted. The plaintiff, in such a case, must prove a joint indebtedness, and a several judgment cannot be given. *N. Y. Com. Pl.*, 1859, *Sager v. Nichols*, 1 *Daly*, 1.
22. Where premises were insured in two separate companies for distinct sums, and each contract of insurance contained the same stipulations on the subject of electing to re-build, &c., and both companies united in notifying the insured of their election to re-build after the loss;—*Held*, that the insured might maintain his action against the companies, jointly or severally, for a breach of the contract to re-build. *Ct. of Appeals*, 1865, *Morrell v. Irving Fire Ins. Co.*, 33 N. Y., 429.
23. Committee or guardian of a non-resident lunatic infant, who is made defendant in proceedings for a partition, brought in a court of this State, may properly apply by petition for the appointment of a guardian *ad litem*, residing within the jurisdiction of the court. *Ct. of Appeals*, 1866, *Rogers v. McLean*, 31 *How. Pr.*, 279.
24. The commissioners of the sinking fund of the city of New York may maintain an action to enjoin the unlawful removal of the markets from which the city derives a revenue. *Supreme Ct.*, *Sp. T.*, 1866, *Hoffman v. Schultz*, 31 *How. Pr.*, 385.
- CLAIM AND DELIVERY, 1: COMPLAINT, 5: COSTS, 11: EJECTMENT: MARINE COURT, 3: WITNESS.

PARTITION.

1. The party objecting to the validity of a sale on partition among heirs, on the ground that four years have not elapsed since the decedent's death, and therefore a good title cannot be given if it should be found that his personal estate was insufficient to pay his debts, should show there is some cause to believe the personal estate was insufficient to pay the debts. In

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the absence of any proof to that effect, the presumption is adverse thereto [5 Abb. Pr., 53; 7 Paige, 550.] *Supreme Ct.*, 1865, *Bogert v. Bogert*, 45 *Barb.*, 121.

2. The power of the supreme court at a general term to order an amendment of proceedings had in a partition suit, pending on appeal,—stated. *Ct. of Appeals*, 1866, *Rogers v. McLean*, 31 *How. Pr.*, 279.

PARTNERSHIP.

1. Where the articles of copartnership do not give either partner a right to dissolve at will, an allegation by one partner, contained in a pleading, and not responsive to any proposal of his adversary, of his desire to dissolve, is not equivalent to an acceptance of an offer to dissolve made by the other party, a month previous. *N. Y. Superior Ct.*, 1863, *Smith v. Mulock*, *Ante*, 375.
2. A provision in articles of copartnership, prescribing a definite period for its continuance, is sufficient, without any prohibition of an earlier dissolution, to prevent either party from dissolving it at will. *Ib.*
3. The rule that when a balance is struck between partners, and a promise to pay is made, an action at law lies to recover the amount,—applied, where, on the dissolution of an unincorporated association, a resolution was passed determining the share of the common fund which should be paid to each member, and the defendant (the treasurer) promised to pay such balances. *N. Y. Com. Pl.*, 1866, *Kochler v. Brown*, 31 *How. Pr.*, 235.

CAUSE OF ACTION, 13: GOOD-WILL: PARTIES, 8, 20: VARIANCE, 1.

PAYMENT.

Where a charter party was made in a foreign country subsequent to the legal tender act, with a stipulation that the freight was to be paid, if cargo were discharged in the United States, in gold and silver dollars, or by approved bills on London;—*Held*, that freight on discharging cargo here could be paid in legal tender notes. *N. Y. Superior Ct.*, 1866, *Wilson v. Morgan*, *Ante*, 174.

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1. An affirmative allegation which, if uncontroverted, is to be taken as true, should be direct and positive; one which at most merely implies a fact or justifies an inference that such is or will be claimed to be the fact, should not be construed as a material allegation. [3 *Duer*, 161.] *Supreme Ct.*, 1865, *West v. American Exchange Bank*, 44 *Barb.*, 175.
2. The burden of charging, as well as proving, fraud, is on the party alleging it; and while it is not necessary or proper that he should spread out in his pleading the evidence on which he relies, he must aver, fully and explicitly, the facts constituting the alleged fraud. Mere conclusions will not avail. *Supreme Ct.*, 1865, *Butler v. Viele*, 44 *Barb.*, 166.
3. An action to recover back money lost at play, is not an action for a pen

- alty or a forfeiture, within the meaning of the provision of the Revised Statutes, which gives a short mode of pleading in such cases. *N. Y. Com. Pl.*, 1866, *Arrieta v. Morrissey*, *Ante*, 439.
4. Where an infant sues by a guardian *ad litem*, the complaint must allege the due appointment of the guardian. [13 How. Pr., 413.] *Supreme Ct.*, 1865, *Grantman v. Thrall*, 44 *Barb.*, 173
 5. Where a complaint was entitled—"J. G., by J. G., his guardian, v. G. T.," and commenced thus: "The plaintiff complaining, states," &c., but contained no allegation that the plaintiff was an infant, under the age of twenty-one years, or that the guardian was appointed by any court;—*Held*, bad on demurrer, for the reason that while it showed that the plaintiff appeared by guardian, it did not show that the guardian was duly appointed, so as to authorize such appearance. [8 Cow., 235:] *Ib.*
 6. A complaint by a receiver, appointed in supplementary proceedings, alleged that a fund was given by will to the defendants as trustees, in trust, to keep the same invested, and pay the interest to the execution debtor during his life; that the defendants had collected interest since the appointment of the plaintiff as receiver, but refused to pay the same over to the plaintiff. It did not aver that any part of the interest was in the hands of the defendants as a surplus above what was necessary for the debtor's support;—*Held*, that the complaint did not state facts sufficient to constitute a cause of action. *Ct. of Appeals*, 1865, *Graff v. Bonnett*, 31 *N. Y.*, 9.
 7. The interest of the debtor in the income of the fund under such a trust is only subject to the claims of creditors, to the extent of a surplus over and above what is necessary or proper for his maintenance and support. The court cannot infer that such a surplus exists. It is the duty of the pleader, by proper averments, to show that such fact exists. *Ib.*
 8. In an action against the New York Central Railroad Company to recover a statute penalty, for exacting an excessive fare;—*Held*, that it was not necessary that the complaint should set out the various enactments consolidating the several companies which make up the New York Central Railroad Company, so as to show that the latter company is restricted to a fare of two cents per mile for each passenger, but that it was enough to allege that the defendants had been duly organized; that they were entitled to demand and receive of passengers a certain rate of fare, and that they had demanded and received a higher rate. *Ct. of Appeals*, 1864, *Nellis v. New York Central Railroad Company*, 30 *N. Y.*, 505.
 9. Whether a judgment creditor, injured by the escape of his debtor from arrest, elects to sue the sheriff at common law for an escape, or under section 201 of the Code of Procedure, as bail, is manifested by the complaint. If he proceeds against the sheriff as bail, he must set forth the proceedings to, and including the escape, and allege that the defendant is bail; and must demand the appropriate judgment. If he elects to prosecute for an escape, the complaint will contain the same matters, but all allegations as to the character of the defendant as bail, should be omitted, as wholly irrelevant to the cause of action for an escape. A complaint in such a case, which makes no mention of the defendant as bail, and con-

tains nothing manifesting an intention or election to hold him liable in that character is to be treated as intending on an action for an escape. *Ct. of Appeals*, 1864, *Smith v. Knapp*, 30 N. Y., 581.

10. An allegation that the defendants have fraudulently confederated and conspired together for the purpose of harassing the plaintiff by prosecuting separate suits against him for the same cause; and that such suits have been commenced, and are prosecuted in pursuance of such conspiracy, is not sufficient to sustain an action, or uphold an injunction, when the defendants claim adversely to each other, as well as to the plaintiff, and no direct fraud is charged; the plaintiff merely averring his belief of such conspiracy, because the defendants have brought separate actions for the same cause, and by the same attorney. Fraud, in such a case, is not to be presumed; and the conspiracy should be distinctly averred. *Supreme Ct.*, 1866, *McHenry v. Hazard*, 45 *Barb.*, 657.
11. In a complaint in a creditor's action seeking to set aside a conveyance as fraudulent, an allegation that the grantee, the debtor's wife, gave no consideration for the premises conveyed to her, and that the whole consideration came from her husband, is a sufficient allegation of bad faith or fraudulent intent on her part. *Supreme Ct.*, 1864, *Newman v. Cordell*, 43 *Barb.*, 448.
12. In a complaint to set aside a deed as fraudulently obtained, a general allegation in the complaint that the grantee procured the deed by "false and fraudulent representations and practices, and by under and improper influences," is insufficient, without stating the nature of the alleged representations and practice, or influences. *Supreme Ct.*, 1865, *Butler v. Viele*, 44 *Barb.*, 166.
13. The Code [§ 149], requires the defendant to deny in his answer only those matters alleged in the complaint which he means to controvert. And it does not follow that because he makes no denial of any allegation in the complaint, this is such an admission of the cause of action that a judgment contrary to the admission is erroneous, if affirmative matter of defence is stated. *Ct. of Appeals*, 1865, *Newell v. Doty*, 33 N. Y., 83, 92.
14. Where an answer is susceptible of being construed to contain either of two defences, one of *payment* and the other of *counter-claim*, the answer should be construed as setting up only the defence of payment, and not as containing a *counter-claim*, and therefore requiring a reply. *Supreme Ct.*, 1864, *Burke v. Thorne*, 44 *Barb.*, 363.
15. In an action to recover for work done by the plaintiff for the defendant, the answer, after admitting the performance of the labor, set forth for a defence to the demands stated in the complaint, that the defendants, during the time of the performance of the labor, had *paid* divers sums of money to and for the plaintiff, to apply in part payment for said labor, specifying the amounts. It then claimed that the plaintiff was indebted to the defendants for the said sums of money, and alleged that the defendants would insist upon the sums so paid, as a counter-claim in the action, and demanded judgment for costs.—*Held*, that the answer did not set up a *counter-claim* so as to require a reply, but that the facts pleaded consti-

- tuted a defence of payment only : and that, therefore, although there was no reply, the whole answer did not stand admitted. *Ib.*
16. A denial may be general or specific at the option of the pleader, but in either case it must be direct or unequivocal. If it merely *implies* that the allegation is controverted, or justifies an *inference* that such is, or will be claimed to be its effect, it will not be construed as a denial. *Supreme Ct.*, 1865, *West v. American Exchange Bank*, 44 *Barb.*, 175.
 17. An allegation in an answer merely in some respects inconsistent with the allegations in the complaint, does not amount to a denial. [21 *Barb.*, 190.] *Supreme Ct.*, 1865, *West v. American Exchange Bank*, 44 *Barb.*, 175.
 18. Where a joint answer of several defendants denies an allegation in the complaint which the plaintiff must prove to establish his cause of action against some of the defendants, but which he need not prove to entitle him to recover against the others, the answer raises no material issue for the defendants as to whom the plaintiff must prove such allegation. *Supreme Ct.*, 1866, *Bank of Cooperstown v. Corlies*, *Ante*, 412.
 19. In an action to recover the possession of lands from several defendants, a defendant who does not set up in his answer that his occupation and possession were exclusive and in severalty, and that the other defendant was in the exclusive occupation and possession of the remaining portion, thereby waives the objection that the plaintiff could not maintain the action against him and the other defendant jointly ; and the plaintiff is not bound to elect at the trial against which of the defendants he will proceed. [2 *Kern.*, 580.] *Supreme Ct.*, 1865, *Dillaye v. Wilson*, 43 *Barb.*, 261.
 20. That the defence of total or partial payment is new matter, which must be set up in the answer for evidence, or it is admissible upon the trial. *Ct. of Appeals*, 1865, *Morrell v. Irving Fire Insurance Co.*, 33 *N. Y.*, 429.
 21. If an answer does not sufficiently disclose the particulars of a transaction, relied on as a defence, the plaintiff's remedy is by motion under section 160 of the Code of Procedure to make the answer more definite and certain. He cannot accept the plea, go to trial upon it, and then interpose the objection for the first time that it is not sufficiently descriptive of the particulars relied on. *Ct. of Appeals*, 1865, *Farmers' & Citizens' Bank v. Sherman*, 33 *N. Y.*, 69.
 22. Where the defence of payment is intended to be set up, it is not necessary that the answer should disclose the particulars of the transaction relied on as constituting payment. Under an averment that the demand has been paid, it is competent to prove that payment has been in fact made, whether in cash, or in some other way. *Ct. of Appeals*, 1865, *Farmers' & Citizens' Bank v. Sherman*, 33 *N. Y.*, 69.
 23. It would be bad pleading to allege evidence of the payment instead of averring the fact itself ; and when the fact of payment is pleaded, it is not required that the particular facts relied on as amounting to payment should have been set forth in the answer. It is enough if those facts sustain the plea of payment. *Ib.*

24. An allegation in the complaint that the defendants sold the plaintiffs' property for a certain sum, and that they "have had the use of, and interest upon, said money since it was received as aforesaid by the defendants for the plaintiffs' use," is sufficiently controverted by a denial in defendants' answer that they sold the plaintiffs' property, or that they received therefor any money whatever to the plaintiffs' use. *N. Y. Superior Ct.*, 1863, *Robinson v. Corn Exchange Insurance Company*, *Ante*, 186.
25. In an action upon an undertaking which was given upon issuing an injunction, and was conditioned to pay all damages sustained thereby, "if the court shall finally decide that the plaintiff (in the injunction suit) was not entitled thereto," if the complaint avers that judgment has been rendered in the injunction suit, in favor of the defendants, but does not disclose the ground of the judgment, nor aver in terms that the court has decided that the plaintiff therein was not entitled to the injunction, an answer merely denying that it has been so decided, and that the present plaintiff has been damnified, and that defendant is indebted to him, is not irrelevant, but raises a material issue. *N. Y. Superior Ct.*, 1863, *De Forest v. Baker*, *Ante*, 34.
26. Nor is it shown to be sham, by an affidavit stating that the complaint in the injunction suit was dismissed, but not disclosing on what ground. *Ib.*
27. In an action to recover money lost at play, since the statute gives the action only for losses exceeding twenty-five dollars at one sitting, and requires it to be brought within three months after payment, the defendant is entitled to require the plaintiff to specify in his complaint the amount lost at each sitting, and the time of payment. It is not sufficient that these facts might be called forth by requiring a bill of particulars. *N. Y. Com. Pl.*, 1866, *Arrieta v. Morrissey*, *Ante*, 439.
28. Upon a demurrer to a distinct defence, stated separately in an answer, no resort can be had to other portions of the answer to sustain such defence, for each defence must be complete in itself. [7 *Abb. Pr.*, 372; 10 *Id.*, 246; 4 *Bosw.*, 391.] *Supreme Ct.*, 1865, *Jackson v. Van Slyke*, 44 *Barb.*, 116, *note*.
29. The plaintiff may demur to an amended answer, just as if it were an original one. The rule is well settled that the amended pleading takes the place of and supersedes the original one. [4 *How. Pr.*, 174; 13 *Abb. Pr.*, 92; *Van Santv. Pl.*, 795.] *Supreme Ct.*, *Sp. T.*, 1865, *Sands v. Calkins*, 30 *How. Pr.*, 1.
30. An answer may be once amended by the party, of course; but where a demurrer has been interposed to an answer, and the defendant amends of course, to which amended answer the defendant also interposes a demurrer, the defendant cannot serve a second amended answer without leave of the court. *Supreme Ct.*, *Sp. T.*, 1865, *Sands v. Calkins*, 30 *How. Pr.*, 1.
31. An objection for a defect of parties,—e. g., the non-joinder of a copartner as plaintiff,—which is not apparent upon the face of the complaint, can only be taken by answer. [Code of Pro., §§ 144, 147.] And if not thus interposed, the defendant must be held to have waived the objection. [*Id.*, § 148; 3 *Kern.*, 336; 33 *Barb.*, 527; 31 *Id.*, 238.] *Supreme Ct.*, 1864, *Conklin v. Barton*, 43 *Barb.*, 435.

POWERS.

32. A motion to dismiss the complaint, on account of a defect of parties defendant, cannot be made at the trial, where the objection is not taken, either by demurrer or answer. *Supreme Ct.*, 1865, *Tremper v. Conklin*, 44 *Barb.*, 456.
33. When, to resist a motion to strike out as sham a defence good on its face, admissions on the part of the plaintiff are positively sworn to, which are neither contradicted, qualified or questioned, and which tend to sustain the defence, the motion should be denied. *N. Y. Com. Pl.*, 1860, *Hadden v. New York Silk Manufacturing Company*, 1 *Daly*, 388.
34. An answer will not be adjudged to be sham simply upon an affidavit that it is false, for this would be trying the merits of the defence upon affidavits. But the court must be satisfied, from an inspection of the pleading, or from circumstances brought to its knowledge, that the object of the plea was to delay or annoy the plaintiff, or to trifle with the court. [1 *East*, 237; 1 *Id.*, 369; 3 *Taunt.*, 339; 1 *Chitty R.*, 424, and note *a*; *Id.*, 564, and note *a*; 5 *Bar. & Ad.*, 750, note *a*; 6 *Cow.*, 34.] *N. Y. Com. Pl.*, 1860, *Hadden v. New York Silk Manufacturing Company*, 1 *Daly*, 388.
35. Sham pleading is the setting up of a defence which has not only no foundation of fact, but which, it is manifest, was interposed for vexation or delay. *Ib.*
36. In an action for damages for negligence, it is not necessary that the answer should aver that the plaintiff's negligence contributed to the injury, in order to enable defendant to offer evidence of that fact. It may be shown under a general denial of the plaintiff's charge that the injury was caused by the defendant's negligence. *Supreme Ct.*, 1864, *MacDonnell v. Buffum*, 31 *How. Pr.*, 154.
37. In an action upon an undertaking given to procure a discharge from arrest, the complaint is bad upon demurrer, if it omits to aver the issuing and return of an execution against the property of the debtor arrested, and also the issuing and return of an execution against the person. *Supreme Ct.*, 1865, *Gauntley v. Wheeler*, 31 *How. Pr.*, 137.

AMENDMENT: ANSWER: APPEAL, 39: ARREST, 2: CAUSE OF ACTION: COMPLAINT: COUNTER-CLAIM: COUNTY COURT, 2: DEFENCES: INTERPLEADER: JOINT DEBTORS: PARTIES, 18, 19: PARTNERSHIP, 1: SET-OFF: SUPPLEMENTAL PLEADING: VARIANCE: VERIFICATION.

PLEDGE.

The lien of a pledgee is destroyed by a tender of the amount due. *N. Y. Superior Ct.*, 1863, *Haskins v. Kelly*, *Ante*, 63.

CAUSE OF ACTION, 11.

POWERS.

Where one of the assessors named in the ordinance of a municipal corporation resigns, and a successor is appointed by the officers in whom the power of appointment is vested by law, the latter must be notified to act.

QUESTIONS OF LAW AND FACT.

The remaining members of the board have not power to proceed without his presence, or notice to him; and an assessment made under such circumstances is irregular. [2 Rev. Stat., 555; 3 Den., 594.] *Supreme Ct.*, 1866, Beekman's Petition, *Ante*, 449; affirming S. C., 19 *Abb. Pr.*, 245.

PRESUMPTIONS.

EVIDENCE.

PROHIBITION (WRIT OF).

Writ of prohibition to command supervisors to desist from laying a tax on a national bank—refused, upon the grounds that the legal right was doubtful, and the remedy would involve public inconvenience. *Supreme Ct.*, 1864, *People v. Supervisors of Ulster*, 31 *How. Pr.*, 237.

PROTEST.

NOTICE, 3.

QUESTIONS OF LAW AND FACT.

1. Where witnesses differ as to the facts, the question whether there was a necessity which justified the master of a vessel in selling a cargo at an intermediate port, must be submitted to the jury. *Ct. of Appeals*, 1864, *Butler v. Murray*, 30 *N. Y.*, 88.
2. What is a reasonable time in which to deliver a passenger and his baggage, is a question of fact, and the finding of the jury on that question will not be disturbed. *N. Y. Com. Pl.*, 1862, *Gilhooly v. N. Y. & Savannah Steam Nav. Co.*, 1 *Daly*, 197.
3. The question as to the reasonableness of the amount of money carried by a passenger in his trunk, for his traveling expenses, is one to be determined by the jury, or by a referee; and if it has been passed upon by a referee, in a given case, his decision should not be disturbed. *Ct. of Appeals*, 1864, *Merrill v. Grinnell*, 30 *N. Y.*, 594.
4. What constitutes negligence is a question of fact for the jury. *Ct. of Appeals*, 1866, *Besigal v. N. Y. Central R. R. Co.*, 31 *How. Pr.*, 181.
5. While negligence is usually a question of fact, for the jury, yet when the undisputed facts show that the defendant is guiltless of all blame, the case resolves itself into a question of law, for the determination of the court upon the evidence introduced. *Supreme Ct.*, 1864, *Calkins v. Barger*, 44 *Barb.*, 424.
6. Whether the matter litigated in a former action (in a justice's court) was a claim in the nature of trespass or trover for a chattel, or only a claim for damages for detaining it, is a question of fact, which should be left to the jury under proper instructions from the court. *So held*, where the complaint in the justice's court did not clearly state the cause of action intended. *Ct. of Appeals*, 1865, *Thurst v. West*, 31 *N. Y.*, 210.

7. Very slight evidence that a person assuming to act as the defendant's agent, was in fact his agent, should suffice to allow the question to go to the jury; as the defendant has it in his power, now that parties may be witnesses in their own case, to show at once if the fact were otherwise, and that the acts of the agent were without his knowledge or authority. *N. Y. Com. Pleas*, 1863, *Western Transportation Co. v. Hawley*, 1 *Daly*, 327.
8. Fraud and fraudulent intent, is always a question of fact for the jury: and although there are cases where it is said the law presumes fraud from certain acts, yet that presumption is only the conclusion of the law upon the facts as they are proven. *Supreme Ct.*, 1865, *Wakeman v. Daly*, 44 *Barb.*, 498.
9. In a creditors' action the question whether the conveyance was made in good faith and for a valuable consideration,—*Held*, to be for the jury. *Supreme Ct.*, 1864, *Newmann v. Cordell*, 43 *Barb.*, 448.
10. The question of fraud in a sale of property is a question of fact for the jury. *Ct. of Appeals*, 1865, *Mathews v. Rice*, 31 *N. Y.*, 457.
11. Where the managing members of an embarrassed corporation unite in forming a new one under the general law, and then transfer to it the property of the former, and a judgment creditor of the former corporation issues an execution upon his judgment, and levies it upon the property so transferred, and becomes himself the purchaser at the sale, under such execution, and a judgment creditor of the latter corporation afterwards levies his execution upon the same goods, as the property of the latter corporation, in an action by the former judgment creditors against the latter, for taking such property, the question whether the latter corporation was formed by the acting members of the former, to hinder, delay, and defraud their creditors, may be raised, and submitted to the jury on proper evidence. *Ct. of Appeals*, 1865, *Booth v. Bunce*, 33 *N. Y.* 139.
12. The question as to the fraudulent purpose of such second corporation, involved in such inquiry, being submitted to the jury,—*Held*, that their finding thereon is conclusive. *Ib.*
13. Where the maker of a maturing note, drawn payable at a bank at a distance, is required, as a condition of renewing it, to pay in addition to interest, a per centage under name of "difference of exchange" between the residence of the parties, and the place where the note is made payable, it is a question of fact, and must be passed upon as such, whether the transaction was or not intended for a device for evading or violating the statute. *Ct. of Appeals*, 1865, *Price v. Lyons Bank*, 33 *N. Y.*, 55. Followed in *Beals v. Benjamin*, *Id.*, 61, 67.
13. In what cases it is the province of the jury to determine, upon evidence as to the usage of trade, what was the intention of the parties. *Pollen v. Leroy*, 30 *N. Y.*, 549; affirming *S. C.*, 10 *Bosw.*, 38.
15. The right to interest, in an action for money received, is a question of law, not of fact. It is only in the class of cases where interest may be charged against a defendant as damages, that he has a right to have the

RECORD.

jury pass upon the question. *N. Y. Superior Ct.*, 1863, *Robinson v. Corn Exchange Insurance Co.*, *Ante*, 186.

16. The question when, and by whom, an alteration in the date of a note was made ;—*Held*, a question of fact for the jury. *Supreme Ct.*, 1866, *Artisans' Bank v. Backus*, 31 *How. Pr.*, 242.

TRIAL.

RECEIVER.

1. The successor or successors of the receiver of any insolvent corporation or joint stock association for banking purposes, who is removed, and neglects for sixty days after the appointment of the successor, to pay over the moneys remaining in his hands, may bring an action in any court of competent jurisdiction, for the moneys so neglected to be paid over, or any part thereof, against the receiver or receivers so removed, and his or their sureties on the bond. 1 *Laws of 1866*, 44, ch. 26.
2. A receiver, appointed in proceedings supplementary to execution, does not become thereby vested with the property which belonged to the judgment debtor at the time of the commencement of the proceedings, and has been transferred by the debtor subsequent thereto, and before the appointment of the receiver. *Supreme Ct.*, 1865, *Fillmore v. Horton*, 31 *How. Pr.*, 424.
3. Where an action is brought by a receiver appointed in supplementary proceedings, to reach the assets of the judgment debtor, the judgment creditors are not liable for costs to the defendant, unless it be shown that the action was brought at their sole suggestion and urgency, and was virtually conducted by them. The provision of the laws of 1849, ch. 390,—that a person beneficially interested in an action brought in the name of another, shall be liable for the costs,—was not intended to apply to actions brought in the name of officers of the court, especially where brought by leave of the court. *N. Y. Superior Ct., Sp. T.*, 1866, *Cutter v. Reilly*, 31 *How. Pr.*, 472.

CORPORATION: JUDGMENT, 4.

RECOGNIZANCE.

When the acknowledgment of a recognizance is upon it when the recognizance is presented to the judge who lets the prisoner to bail, which acknowledgment was taken before another judge, the judge letting to bail will be deemed to have approved of such acknowledgment; and his approval of what has been done, is equivalent to a precedent authority. *Supreme Ct.*, 1865, *The People v. Hurlbult*, 44 *Barb.*, 126.

EVIDENCE, 47.

RECORD.

ERROR, 2.

REFERENCE.

REFERENCE.

1. Where an action for breach of covenant to repair involves the examination of a long account, it may be referred. *N. Y. Com. Pl.*, 1865, *Hatch v. Wolfe*, *Ante*, 77.
2. The referee has nothing to do with the question of costs in an action to recover a money demand on contract. *Supreme Ct., Sp. T.*, 1865, *Tilman v. Keane*, *Ante*, 23.
3. The provision of section 273 of the Code of Procedure,—which fixed the time within which referees must report,—amended to read as follows: The referee or referees shall make and deliver a report within sixty days from the time the action shall be finally submitted; and in default thereof, and before the report is delivered, either party may serve notice upon the opposite party that he elects to end the reference, and thereupon the action shall proceed as though no reference had been ordered, and the referees shall not, in such case, be entitled to any fees. *2 Laws of 1866, 1839, ch. 824, § 8.*
4. The report of a referee must contain his findings of fact, and conclusions of law, and no judgment should be entered upon the report before these are filed. [28 Barb., 462.] If his report is general, a further report may be required by motion. *Supreme Ct., Sp. T.*, 1865, *Tilman v. Keane*, *Ante*, 23.
5. Upon an application under the act of 1858, to set aside an assessment for local improvement on the ground of fraud or illegal irregularity, the court are not authorized to order a reference. The statute does not expressly allow it; and there is no law of this State which allows a judge, in a proceeding out of court, to refer the case. *Supreme Ct.*, 1865, *People v. Brennan*, 45 Barb., 344.
6. The practice of referring motions to vacate orders of arrest, to be determined by referees, is objectionable. Such motion should be determined by the judge, upon the affidavits presented. *Supreme Ct., Sp. T.*, 1865, *Huelet v. Reyns*, *Ante*, 27.
7. No judge or justice to sit as referee in his own court, *unless the parties otherwise stipulate.* *2 Laws of 1866, 1839, ch. 824, § 8; amending Code of Pro., § 273.**
8. The doctrine that a receiver appointed by the court is one of its officers, and moneys in his hands being in the custody of the court, no action can be brought against him to recover those moneys without the permission of the court, is applicable by analogy to referees. *Supreme Ct.*, 1864, *Higgins v. Wright*, 43 Barb., 461.
9. In an action against executors, the decision of the judge at special term, that they unreasonably refused an offer to refer the claim, and are, therefore, liable for costs, will not be reviewed as to the facts, upon an appeal; and on awarding costs and an allowance in such a case, after judgment, it is proper to enter the order *nunc pro tunc*, without requiring a re-entry of the judgment. *Supreme Ct.*, 1865, *Biblo v. Binsse*, 31 How. Pr., 476.

AMENDMENT, 6: EXCEPTIONS, 2, 3, 5.

* The amendment consists in adding the words in italics.

REGISTER OF DEEDS.

CHATTEL MORTGAGE, 1.

RELIGIOUS CORPORATIONS.

1. Religious corporations have inherent power to alien their property; and although the statute requires an application to the court for leave to make any sale of their real property, this does not restrict their power to the making of sales for money. The court may sanction a conveyance for any other purpose. *N. Y. Superior Ct.*, 1866, *The Madison Avenue Baptist Church v. The Baptist Church in Oliver Street*, *Ante*, 214; reversing *S. C.*, 19 *Abb. Pr.*, 105.
2. Two religious societies may unite with each other, and a conveyance of the property of one, to the society so formed, may be sanctioned by the court, under the statute. *Ib.*
3. Where the real and only consideration for the proposed transfer was a union between two societies, the terms of which appeared in the application and order;—*Held*, that this was a sufficient statement of the application of the moneys. *Ib.*
4. In these proceedings the better practice is to negotiate and agree upon the terms of the sale first, and then lay the agreement before the court for its sanction. *Ib.*
5. The application may be made by the trustees, if it be shown that a majority of the corporators approve it. *Ib.*
6. The title under the conveyance is not affected by indefiniteness of the order in respect to the application of the proceeds. *Ib.*
7. Their application may be directed by a separate order from that authorizing the sale. *N. Y. Superior Ct.*, 1866, *The Madison Avenue Baptist Church v. The Baptist Church in Oliver Street*, *Ante*, 214; *S. C.*, 30 *How. Pr.*, 455; reversing *S. C.*, 19 *Abb. Pr.*, 105.
8. The order of the court permitting the conveyance of real property by a religious corporation, constitutes no estoppel in favor of a grantee who has parted with nothing as the consideration for the deed. Without the authorization of the court, the grant of the real estate of a religious corporation is of no value, and the party injured would require no proof in such a case to establish its invalidity. The order of the court gives the deed merely regularity of form, and renders additional proof necessary to overthrow it, as in other cases where an objection is raised to the validity of a deed. The order is not an adjudication between the parties, and has not the effect of *res adjudicata*. *Supreme Ct.*, 1865, *St. James' Church v. Church of the Redeemer*, 45 *Barb.*, 356.

SATISFACTION OF PART OF PLAINTIFF'S CLAIM.

The provision of section 244 of the Code of Procedure,—that when the answer admits part of the plaintiff's claim to be just, the court may order the defendant to satisfy that part,—applied in a peculiar case. *Roosevelt v. N. Y. & Harlem R. R. Co.*, 45 *Barb.*, 554; *S. C.*, 30 *How. Pr.*, 226.

SET-OFF.

REPLY.

ANSWER, 6, 7: COUNTY COURT, 2: PLEADING, 14.

SECURITY FOR COSTS.

Where the plaintiff had been absent from the State for more than two years on business, but his wife and minor child continued to reside here ;—*Held*, that he was not such a non-resident as that the court would compel him to file security for costs. *N. Y. Com. Pl.*, 1859, *Roberti v. Methodist Book Concern*, 1 *Daly*, 3.

SENTENCE.

It is not necessary that a sentence to imprisonment in a State prison should specify which of the State prisons is intended ; and an omission to do so is not error for which the conviction can be reversed. *Ct. of Appeals*, 1865, *Weed v. People*, 31 *N. Y.*, 465.

SERVICE (AND PROOF OF).

In all suits to recover for penalties brought in the name of the mayor, aldermen, and commonalty of the city of New York, in the district courts of the city, the summons may be served by any male person of the age of twenty-one years, who may be appointed in writing for that purpose by the corporation attorney of the city of New York. 2*Laws of 1866*, 1642, ch. 758.

ATTORNEY AND CLIENT, 1: JUDGMENT, 8: NOTICE: SUMMARY PROCEEDINGS, 9, 10.

SESSIONS.

1. Court of general sessions in New York city may continue its sessions longer than three weeks. *Ct. of Appeals*, 1866, *Ferris v. People*, 31 *How. Pr.*, 140.
2. Record of conviction, in court of sessions, for a criminal offence, must be made and filed ; and fines paid, must be paid over to county treasurer within thirty days. Neglect to comply, declared a misdemeanor. 2 *Laws of 1866*, 1484, ch. 692, § 5.

Consult also, COURT OF SESSIONS.

SET-OFF.

The amount of damages recoverable, in an action brought for a sum fixed by agreement as liquidated damages, may be reduced, by proving that a certain portion of the consideration expressed in the agreement has not been paid. For such portion the defendant has a cause of action arising out of the same transaction, and may off-set it as a counter-claim against the plaintiff's claim for damages. *N. Y. Com. Pl.*, 1865, *Baker v. Cornell*, 1 *Daly*, 469.

COUNTER-CLAIM, 3.

SPECIFIC PERFORMANCE.

SHERIFF.

1. Even after a levy by the sheriff, under a warrant of attachment, and indemnity given to him, upon his request, against liability on proceeding to sell, he is at liberty to return *nulla bona*, provided he acts in good faith. In so doing he assumes the responsibility of proving property out of the defendant in the attachment, and thus supporting his return, but he is not absolutely bound by the statute to detain the property seized in case the creditor indemnifies him. *Supreme Ct.*, 1864, *Lummis v. Kasson*, 43 *Barb.*, 373.
2. The general rule is well settled, that the acts of a sheriff in the return of process, as far as the rights of the parties affected thereby, or their privileges are concerned, must be taken as true when brought into contest collaterally, and can only be impeached by direct proceedings, such as those which make the officer a party, or rectified upon a summary application to the court to annul or set aside the return. [15 *East*, 378; 4 *Burrows*, 2129; 17 *Mass.*, 591; 4 *Id.*, 478; 9 *Id.*, 96; 10 *Id.*, 313; 11 *Id.*, 163; 15 *Id.*, 82; 10 *Pick.*, 169; 1 *Salk.*, 265; 3 *Cowen*, *Hill & Edwards' Notes to Phill. on Ev.*, 370; *Sewells' Law of Sheriffs*, 387; 3 *Wend.*, 202; 20 *Id.*, 301; 7 *Id.*, 398; 6 *How. Pr.*, 297; *Crooke on Sheriffs*, §§ 44, 45; and see also 10 *Wend.*, 525.] *N. Y. Com. Pl.*, 1860, *Sperling v. Levy*, 1 *Daly*, 95.
3. It is no defence to an action by the sheriff against a deputy and his surety on his bond, for neglecting to pay over money collected by him on execution, that no action was brought against the sheriff by the plaintiff in the execution within the three years limited for such actions by section 92 of the Code. It is a breach of the deputy's bond if he failed to pay money collected, even if the sheriff should never be sued or made to pay the amount. [3 *Cowen*, 313.] The deputy's liability depends solely upon his own omission to pay the sheriff, and not in any manner upon what becomes of the money after the sheriff receives it, or who is entitled to it. *Supreme Ct.*, 1864, *Willet v. Stewart*, 43 *Barb.*, 98.

CAUSE OF ACTION, 8: CLAIM AND DELIVERY, 2: DAMAGES, 3-5: EXECUTION, 2.

SHIPPING.

1. The justices of the superior court of the city of New York have power to issue attachments against vessels, under the act of 1862. *N. Y. Superior Ct.*, 1866, *Delaney v. Brett*, *Ante*, 421.
2. On an application for an attachment under that act, a specification of the debt need not be filed, unless the vessel has left the port where the debt was contracted. *Ib.*

SPECIFIC PERFORMANCE.

1. That specific performance of an agreement to transfer stock, may be decreed, where the contract to convey is clear, and the uncertain value of

STAY OF PROCEEDINGS.

- the stock renders it difficult to do justice by an award of damages. *Supreme Ct.*, 1865, *White v. Schuyler*, *Ante*, 300.
2. A contract to pay money in gold and silver, cannot be specifically enforced, nor can any other damages be recovered, upon its breach, except interest. *N. Y. Superior Ct.*, 1866, *Wilson v. Morgan*, *Ante*, 174.
 3. In what cases a party may maintain an action, to compel specific performance of a contract to furnish facilities for transportation. *Pennsylvania Coal Company v. Delaware and Hudson Canal Company*, 31 *N. Y.*, 91.
 4. Where a valid contract has been entered into for the renewal of a lease, by which it is provided that the amount of rent to be paid shall be settled by arbitration, and either party refuses to appoint an arbitrator, a court of equity will compel a specific performance, and order a reference to ascertain what the amount of rent should be. The court can, by taking proof, ascertain and fix it with as much certainty as the arbitrators could do; and if the mode of determining it by arbitration cannot be resorted to through the refusal of one of the parties to appoint an arbitrator, there is no reason why the other party should lose the benefit of a contract in all other respects valid and binding, when the court has the means of fixing such a mere matter of detail. [18 *Ves.*, 328; 19 *Id.*, 430; 14 *Abb.*, 195.] *N. Y. Com. Pl.*, 1865, *Kelso v. Kelly*, 1 *Daly*, 419.

STAMPS.

Process on appeals from justices' courts, or other courts of inferior jurisdiction, to a court of record, which, by the internal revenue law, are required to be stamped, are not *void* if not stamped. Congress have not constitutional power to take away the jurisdiction of a State court. *Chenango County Ct.*, 1866, *Lewis v. Randall*, *Ante*, 135.

JUSTICES' COURTS, 11.

STATUTES.

Under our system of government, the moral, religious, and economic interests of society are beyond the sphere of legislative action. The exercise by the legislature of a control over the terms of contracts was never contemplated by the framers of the constitution, and is nugatory. *Supreme Ct.*, *Sp. T.*, 1865, *Powers v. Shepard*, *Ante*, 129.

STAY OF PROCEEDINGS.

On an appeal from a single judge of the marine court to the general term of that court, if a stay of proceedings is wanted, security must be given as on a similar appeal in one of the superior courts; and an undertaking given for that purpose is valid. *Ct. of Appeals*, 1865, *Robert v. Donnell*, 31 *N. Y.*, 446; *S. C.*, *Ante*, 4.

SUMMARY PROCEEDINGS.

1. Summary proceedings under the statute, to recover the possession of land, cannot be sustained unless the conventional relation of landlord and tenant exists between the parties. [5 N. Y. 383.] *Supreme Ct.*, 1866, *People v. Annis*, 45 *Barb.*, 304.
2. An agreement, employing a person to work upon a farm, and give him a house to live in, a garden and pasture, is not a demise of premises, in the nature of a lease, creating the relation of landlord and tenant, which will sustain summary proceedings to dispossess the employee. [3 Hill, 90.] *Ib.*
3. Where a lessee, having been notified that the lessor had appointed an arbitrator under a covenant for a renewal, and being required to appoint one on his own behalf, before the expiration of the lease, fails to do so, he does, at the option of the lessor, waive his right to such renewal; and if, after the landlord gives him subsequently notice that he should require him to pay a specified rent, he holds over, it may be regarded as a new letting from year to year, and not a renewal of the former lease. And the tenant in such case may be dispossessed by summary proceedings as on non-payment of rent. *N. Y. Com. Pl.*, 1860, *Wells v. De Leyer*, 1 *Daly*, 39.
4. A demand of the rent claimed to be due, made of an under-tenant, who is described in the affidavit merely as a person in possession of the demised premises, is not sufficient to give the justice jurisdiction. The demand must be made of the tenant, or three days' notice requiring payment or the possession of the premises, must be served in the manner specified in the statute for the service of the summons. *Supreme Ct.*, 1864, *People v. Platt*, 43 *Barb.*, 116.
5. The preliminary affidavit, which is the foundation of the "summary proceedings to recover the possession of lands," should not be uncertain or contradictory. [16 *Barb.*, 474.] The affidavit should make out a plain case. [6 Hill, 317.] *Supreme Ct.*, 1864, *People v. Mathews*, 43 *Barb.*, 168.
6. A summons issued under 2 Rev. Stat., 513, § 30, as amended Laws of 1851, ch. 60, in summary proceedings against a tenant for holding over after the expiration of his term, may be made returnable on any day from the first to the fifth, as may "appear reasonable" to the magistrate. *Ulster Co. Ct.*, 1865, *Russel v. Ostrander*, 30 *How. Pr.*, 93.
7. The history of the legislation upon this subject reviewed. *Ib.*
8. Summons against person continuing in possession of demised premises in New York and Kings counties, not to be returnable before the day following its service, except when said term expires on the first day of May, in which case the summons may be returnable on the same day. 2 *Laws of 1866*, 1636, ch. 754.
9. An affidavit of the service of the summons, which states that the service was made by "leaving a true copy of the same with a person who said he belonged there, at his last or usual place of residence, with a person of mature age, who, at the time of said service was on said premises, and resided thereon, said tenant being then absent from his last and usual place of business,"—is defective, as not showing that the copy was left with a

SUPPLEMENTAL PLEADINGS.

- person of mature age at the last or usual place of residence of *the tenant*. [1 Hill, 512.] *Supreme Ct.*, 1864, *People v. Mathews*, 43 *Barb.*, 168.
10. An affidavit of the service of a summons, under the statute relative to "summary proceedings to recover the possession of land," which alleges a service upon an under-tenant, on the demised premises, and that the tenant was absent from his last and usual place of residence; without stating that such residence was upon the demised premises, is insufficient to give jurisdiction. *Supreme Ct.*, 1864, *People v. Platt*, 43 *Barb.*, 116.
 11. Proceedings to dispossess under the statute cannot be reversed on *certiorari* brought by one who was not a party to the proceedings, although dispossessed under the warrant, where, by the record, the proceedings appear to have been regular, and the only grounds of irregularity appear by extrinsic facts alleged in his affidavit on the application for the *certiorari*. *Supreme Ct.*, 1865, *Starkweather v. Seeley*, 45 *Barb.*, 164.

FORMER ADJUDICATION, 7.

SUMMONS.

1. An action against the sureties in an undertaking given pursuant to section 209 of the Code of Procedure, in an action of claim and delivery of personal property, conditioned for a return of the property, if a return should be adjudged, and for the payment of such sum as should, for any cause, be recovered against the plaintiff in the action, is substantially one for the payment of money; and a summons for a money demand, in such an action, is proper. *N. Y. Com. Pl.*, 1860, *Montegriffo v. Musti*, 1 *Daly*, 77.
2. The omission to serve a copy of the complaint together with the summons, where the summons is in the form appropriate for serving both together, and to state in the summons the place of filing the complaint, does not affect the validity of the judgment entered thereon. It is amendable. *N. Y. Com. Pl.*, 1866, *Foster v. Wood*, *Ante*, 150.
3. Where the action is against joint debtors, a part of whom only are served, such defect in the summons is no reason for dismissing proceedings to enforce the judgment against those not served. *Ib.*
4. It is too late at the trial to object that the complaint and summons vary; that the summons was under the wrong subdivision of section 129 of the Code of Procedure, to justify the complaint under it. That objection should be presented by motion, in order that an amendment might be made on just terms. If necessary to sustain the judgment, the summons may be amended on appeal from the judgment, so as to conform to the facts proved. *Supreme Ct.*, 1864, *Willet v. Stewart*, 43 *Barb.*, 98.

JOINT DEBTORS: JUDGMENT, 10: MARINE COURT, 1: SERVICE (AND PROOF OF): SUMMARY PROCEEDINGS, 6, 8.

SUPPLEMENTAL PLEADING.

Either party may, by leave of the court in any pending or future action, set up, by supplemental pleading, the judgment, or decree of any court of com-

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petent jurisdiction rendered since the commencement of such action, determining the matters in controversy in said action, or any part thereof, and if said judgment be set up by the plaintiff, the same shall be without prejudice to any provisional remedy theretofore issued, or other proceedings had in such action, on his behalf. 2 *Laws of 1866, 1868*, ch. 824, § 6; amending *Code of Pro.*, § 177.

SUPPLEMENTAL PROCEEDINGS.

1. The affidavit to procure the examination of a third person in proceedings supplementary to execution, under section 294 of the Code of Procedure, need not state that the property of the judgment debtor in his hands exceeds ten dollars. The limitation of ten dollars applies only where the affidavit states that such person is indebted to the judgment debtor. *N. Y. Supreme Ct., Chambers*, 1865, *Brett v. Browne*, *Ante*, 155.
2. An order made in proceedings supplementary to execution, directing the payment to the creditor of money in the hands of a third person, will not affect the rights of an assignee who has advanced money on the faith and security of the fund in good faith, and who is not a party to the supplemental proceedings. The Code of Procedure does not contemplate the adjudication of the rights of the assignees by the judge, in so summary a manner. When the fact of the assignment of a fund in the hands of a depository, by the owner, is made known to the judge, he ought not to order it to be paid over to the judgment creditor, and an order requiring such payment is void as against the assignee. *Supreme Ct.*, 1864, *Roy v. Baucus*, 43 *Barb.*, 310.
3. A notice to attend before a referee to be examined in supplementary proceedings, which omitted to state the *place* where the debtor should attend; —*Held*, fatally defective. *N. Y. Com. Pl., Sp. T.*, 1866, *Kelly v. Yerby*, 31 *How. Pr.*, 95.

RECEIVER, 2, 3.

SURPLUS MONIES.

FORECLOSURE, 3.

SURROGATES' COURTS.

1. Under the power conferred upon the surrogate by 2 Rev. Stat., 220,—to direct and control the conduct, and settle the accounts of executors and administrators,—to enforce the payment of debts and legacies, and to administer justice in all matters relating to the affairs of deceased persons,—he has ample authority to compel executors to perform their duty by expending, for the benefit of infant legatees, the interest of a sum of money intrusted to them for that purpose, by the testator. Although the executors might be made liable in an equitable action instituted in the supreme court for that purpose, yet it by no means follows that the surrogate is deprived of jurisdiction. The powers of the surrogate, as defined by statute, are not intended to exclude such cases. *Supreme Ct.*, 1864, *Dubois v. Sands*, 43 *Barb.*, 412.

TAXES.

2. It is no objection to the decree of a surrogate that it required interest to be paid up to the date of the decree. Nor is it of any consequence that the decree does not provide for commissions to the executors, if not claimed on the hearing. These can be allowed upon a final accounting. *Supreme Ct.*, 1864, *Dubois v. Sands*, 43 *Barb.*, 412.
3. Provisions for the completion of unfinished business in the office of the surrogate of Onondaga county. 1 *Laws of 1866*, 23, ch. 6.
4. On appeal to the supreme court from a decree of a surrogate denying probate of an instrument propounded as a will, the court, if it deems the decree against the evidence, is not bound to award a feigned issue to try the questions of fact, but may direct such judgment and decree to be entered as the surrogate should have made. There is no statute limiting the powers of the supreme court in regard to the disposition of such appeals, and the court has, by express provision, all the powers and jurisdiction possessed by the former court of chancery [Const., art. 6; Judiciary act, 1847, § 16]; which had authority, on appeal, to declare a paper valid or invalid as a will, and to adjudge that it be admitted to or refused probate. That court possessed this power by virtue of its general jurisdiction. [26 *Wend.*, 318, *et seq.*; 8 *Paige*, 502; 10 *Id.*, 85; 11 *Barb.*, 661; 22 *N. Y.*, 420; 22 *Barb.*, 84, 85; 2 *Bradf.*, 181.] *Supreme Ct.*, 1865, *Pilling v. Pilling*, 45 *Barb.*, 86.
5. The supreme court, on appeal from the surrogate, will not determine, for the first time, a question of fact which was not examined and determined below, but was assumed for the purpose of the decision of other points; but if such question is material to the other questions raised on the appeal, the court may examine it, for the purpose of seeing what probability there is of the appellants sustaining the point on a re-trial. *Supreme Ct.*, 1866, *Christy v. Clarke*, 45 *Barb.*, 529.
6. Upon an appeal to the supreme court from a surrogate's court, the successful party is not entitled to costs, as in a civil action, at the rates fixed by section 307 of the Code of Procedure, but only the costs of trial of an issue of law. *Supreme Ct.*, 1865, *Morgan v. Morgan*, *Ante*, 40.
7. The fees of surrogates' courts regulated. *Laws of 1863*, ch. 362, as amended by 2 *Laws of 1866*, 1683, ch. 784.

TAXES.

Under the law relative to the assessment of taxes (*Laws of 1851*, 334, ch. 176),—which takes away the conclusiveness of the affidavit, and makes it the duty of the assessors, when an application is made by any person to reduce the value of his real and personal estate, to examine such person under oath touching the value of his property, and after such examination to fix the value thereof as they may deem just,—the assessors act judicially in fixing the value, and are called upon to pass upon the evidence produced before them; and when they have no ground in such evidence to fix a valuation different from that sworn to by the person applying for such reduction, they are bound to take and follow his statement under oath. The assessors must act upon the evidence before them, like all other

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officers acting in a judicial capacity, and fix the valuation at a just sum, such as will be warranted by the evidence. *Supreme Ct.*, 1864, *People v. Reddy*, 43 *Barb.*, 539.

CERTIORARI, 2-6, 8, 9: MANDAMUS, 5, 6: PARTIES, 13.

TIME.

It is a general rule, where two periods are fixed within which an act may be done, that it may be done on any intervening day, unless some day be expressly excluded. *Ulster Co. Ct.*, 1865, *Russell v. Ostrander*, 30 *How. Pr.*, 93.

TRIAL.

1. When, in the first judicial district, a cause is noticed for trial, it must be put upon the calendar for the term for which it is noticed. A cause not upon the calendar cannot be moved on for trial, and a party not finding the cause on the calendar of the term for which he had received notice of trial, is not bound to examine, from term to term thereafter, to ascertain if the cause is in a condition to be called up for trial. *N. Y. Superior Ct.*, 1866, *Culver v. Felt*, 30 *How. Pr.*, 442.
2. Formerly a notice of trial and a note of issue were both required for each term of the court: the alteration in that respect in the first judicial district merely requires one notice, and one note of issue, but does not relieve parties from the necessity of placing their cause upon the calendar until such time as it was likely to be reached, and compel the adversary, at the peril of being defaulted, to examine daily the calendars of the court. *Ib.*
3. In the settlement of issues in a divorce case, an issue whether the party was guilty of adultery with a specified person, at any time before the commencement of the action, should not be allowed. Some limits of time and place must be indicated. *N. Y. Superior Ct.*, 1865, *Strong v. Strong*, *Ante*, 233.
4. But issues actually made in the pleadings, and inserted accordingly, without objection, in the issues as framed for trial, will not be expunged on motion, on the mere ground of indefiniteness as to time and place. *Ib.*
5. The judge has power to excuse jurors without cause, who have been empannelled for a term. *Supreme Ct.*, 1865, *People v. Ferris*, *Ante*, 193; affirmed 31 *How. Pr.*, 140.
6. The judge at the circuit may in all cases, in his discretion, with or without the consent of the parties, allow the jury to take to their room any written documents or papers received and used in evidence on the trial of a cause. *Supreme Ct.*, 1865, *Porter v. Mount*, 45 *Barb.*, 422.
7. Where the plaintiff in his complaint united a cause of action (equitable) for the redemption of a pledge, with a cause of action (legal) for damages for the conversion of it; and the proofs on trial at special term showed that he was not entitled to the equitable relief prayed, and the statute of limitations would bar a new action for damages;—*Held*, that instead of

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- dismissing the complaint, the court should deny the equitable relief asked, and direct the case to be tried as an action at law before a jury. *Supreme Ct., Sp. T.*, 1866, *Genet v. Howland*, 45 *Barb.*, 560; S. C., 30 *How. Pr.*, 360.
8. A request to charge the jury should be made in such form that the court may charge in the very terms of the request, without qualification. [11 *N. Y.*, 61.] The judge is not required to separate a proposition of counsel, and pick out what is good, and refuse the rest. [24 *How. Pr.*, 172.] *Supreme Ct.*, 1864, *Newman v. Cordell*, 43 *Barb.*, 448.
 9. It is a matter of discretion for the judge to exclude a question on the ground that it has already been answered in effect; and as such, the exclusion is not reviewable on appeal. *N. Y. Com. Pl.*, 1861, *Ballard v. Lockwood*, 1 *Daly*, 158.
 10. Where it is the purpose of counsel to render evidence, apparently irrelevant, material, by connecting other facts with it, it is his duty to state the proposition which he proposes to establish, or the fact which he expects to prove, so that the judge may see its bearing, and determine as to its materiality. Where counsel, instead of pursuing that course, simply excepts to a decision overruling a question, which, upon its face, has nothing to do with its merits, the exception will not be sustained. *Ct. of Appeals* 1865, *Chapman v. Brooks*, 31 *N. Y.*, 75.
 11. In answer to a question whether A. was able to pay his debts at a certain time;—*Held*, that *facts* respecting the property and indebtedness of the person might be stated as well as the *opinion* of the witness. *Supreme Ct.*, 1866, *Thompson v. Hall*, 45 *Barb.*, 214.
 12. Whether or not a leading question may be put to a witness, is a matter of discretion with the judge at the trial. *Supreme Ct.*, 1865, *Black v. Camden & Amboy R. R. Co.*, 45 *Barb.*, 40.
 13. An offer to show that the witness had been convicted and imprisoned for gross intoxication on a certain day;—*Held*, properly excluded, as it was an effort to impeach a witness by proof of a particular offence. *N. Y. Com. Pl.*, 1860, *Greaton v. Smith*,* 1 *Daly*, 380.
 14. That an offer by defendant to show that one of several plaintiffs has assigned his interest in the cause of action, is properly excluded. *Boyce v. Brockway*, 31 *N. Y.*, 492.
 15. In an action against a railroad company for injuries to the plaintiff by a train at a crossing, it is proper to charge that though the company were under no obligation to keep a flagman at a road crossing, yet if it had been for a long time accustomed to keep a flagman there, and the public were accustomed to see him there, they would have the right to suppose that no trains were coming when he was not out; and to refuse to charge that the rights of a citizen to the highway, at a railroad crossing, are subversive to the rights of the corporation. *Supreme Ct.*, 1866. *Warner v. New York Central R. R. Co.*, 45 *Barb.*, 299.
 16. Whether a name in the list of creditors, variant from that of the plaintiffs', was intended to designate them, or whether their names were

* Affirmed, 33 *N. Y.*, 245.

- omitted, and if so, whether the omission was fraudulent;—*Held*, in this case properly submitted to the jury. *Soule v. Chase, Ante*, 48.
16. Where the judge charged the jury that the defendants were estopped from setting up and relying upon their title to the premises as a defence to the action;—*Held*, that under this charge the jury were not at liberty to consider the question of estoppel as a question of fact, but were bound to consider the case on the assumption that as matters of law the defendants were estopped from asserting title to the premises, and that in this respect the court erred in its charge. That the question belonged to the jury, and should have been submitted to them as a question of fact. *Ct. of Appeals*, 1864, *Brown v. Bowen*, 30 *N. Y.* 519.
 18. In an action against bankers for negligence in the protest of a note, the charge respecting the amount of damages should have reference, not to the amount which the plaintiffs might have collected of the endorser, with reference to his *character*, but with reference to his *pecuniary ability*. *Supreme Ct.*, 1865, *Bridge v. Mason*, 45 *Barb.*, 37.
 19. Where a jury are instructed, in a case of negligence, to award the damages the plaintiff has sustained, the court may leave to them to say whether on such damages the plaintiff is entitled to interest. [6 *Den.*, 55; 5 *Bosw.*, 625.] But it is erroneous to instruct them, as a matter of law, that the plaintiff is entitled to recover interest on the damages. *Supreme Ct.*, 1865, *Black v. Camden & Amboy R. R. Co.*, 45 *Barb.*, 40.
 20. Where the complaint was not given in evidence, and the plaintiff was not asked any questions in relation to its contents;—*Held*, that the judge properly refused to charge the jury that the discrepancy between the plaintiff's sworn complaint, and the testimony, might be taken into consideration in considering his credibility. *N. Y. Com. Pl.*, 1861, *Fash v. Third Avenue R. R. Co.*, 1 *Daly*, 148.
 21. It is the intendment of law that a verdict settles, in favor of the prevailing party, every question of fact litigated upon the trial. The court will not intend that the jury found either of the issues in favor of the unsuccessful party, for the purpose of overturning their verdict, but will hold that every issue was found against the unsuccessful party, if necessary to sustain the verdict. If the jury gave the plaintiff less than he was entitled to recover, upon the finding of the issues, that is an error of which the plaintiff alone complain. If he submits to the verdict, the defendants cannot be heard to insist that it shall be set aside because it is unjust to the plaintiff. *Supreme Ct.*, 1864, *Wolf v. Goodhue Fire Ins. Co.*, 43 *Barb.*, 400.
 22. In an action against husband and wife to recover the usurious excess of interest, where the defendants defended separately, a verdict against one only, with no reference to the other defendant, is a mistrial, and no judgment can be entered upon it. The verdict cannot be sustained by allowing the plaintiff to amend the complaint by inserting in it the proper statements, alleging that the defendants are husband and wife, so that the verdict may stand, retaining the former's name in the record as husband, but without any judgment against him. But the plaintiff may be allowed

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to dismiss the complaint, and discontinued the action against the husband to the same effect as if a verdict had been found in his favor at the circuit, and enter judgment on the verdict against the wife, if justice requires it. *Supreme Ct.*, 1865, *Porter v. Mount*, 45 *Barb.*, 422.

23. The expression of an opinion by the sheriff, as to the guilt or innocence of the prisoner, is not sufficient cause of challenge to the array, unless he does some act, or omits some duty, by reason of which some juror called upon to try the case is disqualified. *Supreme Ct.*, 1865, *People v. Ferris*, *Ante*, 193; affirmed, 31 *How. Pr.*, 140.

25. Where the complaint contains several causes of action, and the court, upon the trial, nonsuit the plaintiff as to one, and continue the case as to the other (a course which is of doubtful propriety), evidence which has been given under the one issue tending to show fraud in the defendant, is not necessarily to be excluded from the consideration of the jury in determining the question of fraud under the other issue. It is in the discretion of the judge to allow such evidence to be commented on by counsel. A charge to the jury that they may consider this evidence, is not ground for reversing the judgment upon a bill of exceptions. The remedy, if any, is by a motion for a new trial. *Supreme Ct.*, 1855, *Meyer v. Goedel*, 31 *How. Pr.*, 456.

25. In an action by the general assignee of a debtor, to recover for goods wrongfully taken from the debtor, and, while in the wrongdoer's possession, seized on attachments against the debtor, and sold under them at a sacrifice, the measure of damages is the true value of the goods, less the amount realized at the sale. *Supreme Ct.*, 1866, *Ward v. Benson*, 31 *How. Pr.*, 411.

26. Irregularities in drawing a panel of jurors, which appeared not to have prejudiced the prisoner;—*Held*, no ground for reversing conviction had in the New York court of general sessions. *Ct. of Appeals*, 1866, *Ferris v. People*, 31 *How. Pr.*, 140.

27. That sanity is presumed, and it is never incumbent on the prosecution, in a criminal case, to give affirmative evidence that the accused was sane. *Ct. of Appeals*, 1866, *Ferris v. People*, 31 *How. Pr.*, 140.

AMENDMENT: DAMAGES, 1: DISMISSAL OF COMPLAINT, 1: DISTRICT COURTS OF THE CITY OF NEW YORK, 3-5: EVIDENCE: EXCEPTIONS: INDICTMENT, 3, 4: JURORS: JUSTICES' COURTS: NONSUIT: PARTIES, 21: QUESTIONS OF LAW AND FACT: REFERENCE: SUMMONS, 4: VARIANCE: WITNESS.

TRUSTEES.

The provision of 2 Rev. Stat., 94, § 66,—which authorizes testamentary trustees, &c., to settle their accounts before the surrogate,—amended by adding a provision that on all such accountings of such trustees, the surrogate before whom such accounting may be had, shall allow to the trustee, or trustees, the same compensation for his or their services, by way of commissions, as are allowed by law to executors and administrators, and also such allowance for expenses as shall be just and reasonable, and if there be more than one trustee, and the estate be insufficient to give full commissions to each trustee, said surrogate shall apportion such compensation and allowance among said trustees, according to the services rendered by them respectively. 1 *Laws of 1866*, 233, ch. 115.

VARIANCE.

UNDERTAKINGS.

1. In an action upon an undertaking, given under section 356 of the Code, to obtain a stay of execution, after an appeal and affirmance, it is not proper to inquire at the trial whether or not the appeal had been perfected by the filing of the undertaking required by section 354 of the Code. It is enough that the instrument sued on conforms to the statute. *N. Y. Com. Pl.*, 1860, *Sperling v. Levy*, 1 *Daly*, 95.
2. It is sufficient to establish the plaintiff's right to recover, to prove the undertaking entered into by the defendants, the rendition of the judgment therein referred to, and the sheriff's return of the execution issued upon the judgment, unsatisfied. It is no defence that the execution issued upon the judgment in the justice's court was returned before the expiration of the sixty days. The reasons which may have induced the sheriff to make such a return, or whether it was made at the request of the plaintiff in the action or not, are entirely immaterial, and not the subject of inquiry in such an action. *Ib.*

BOND : DISTRICT COURT OF THE CITY OF NEW YORK, 6 : INJUNCTION, 14,
15 : JUSTICES' COURTS, 14 : STAY OF PROCEEDINGS : SUMMONS, 1.

USURY.

1. The defence that a contract is void on account of usury, can only be alleged or set up by the party bound by the original contract to pay the sum borrowed, or his sureties, heirs, devisees, or personal representatives. [7 Hill, 391 ; 1 Barb., 271 ; 4 Id., 346 ; 5 Seld., 241 ; Bayley, 4 ; distinguishing 1 N. Y., 274.] *Ct. of Appeals*, 1865, *Billington v. Wagoner*, 33 N. Y., 31.
2. The party chargeable with the usury cannot be allowed to avail himself of the statute. *Ib.*
3. The defence of usury is an unconscionable one, and the courts will not usually open a judgment obtained by default to establish it, or allow the amendment of a pleading for that purpose. [6 Hill, 226 ; 1 Paige, 427.] *N. Y. Com. Pl.*, 1863, *Farish v. Corlies*, 1 *Daly*, 274.

CAUSE OF ACTION, 9.

VARIANCE.

1. Where a special partnership do not maintain a sign such as the statute requires, no action to be abated or dismissed by reason of the proof of plaintiff of the partnership failing to meet the allegations of his pleading as to the names and number of the partnership ; but the pleading may be amended on the trial to conform to the proof in that respect without cost. 2 *Laws of* 1866, 1424, ch. 661.
2. In an indictment for an offence within five hundred yards of the boundary of two counties, the place of commission, as laid in the indictment, may properly, by way of local description, be described as on the boundary, and within five hundred yards of the boundary line [2 Rev. Stat., 727] ; and there is no variance, if the proof be of an offence committed within five hun-

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dred yards of, though not precisely on, the line. *Supreme Ct.*, 1866, *People v. Davis*, 45 *Barb.*, 494.

COMPLAINT, 6.

VENDOR AND PURCHASER.

1. A stipulation in a deed of real property, or in another instrument between the vendor and purchaser, not merged in the deed, that the vendor shall retain possession for a time, and then shall deliver possession to the purchaser, does not create the relation of landlord and tenant between them during such period. *N. Y. Superior Ct.*, 1863, *Mott v. Coddington*, *Ante*, 290.
2. The premises are meanwhile at the risk of the purchaser; and the vendor is not liable to him, upon such contract, for a loss by fire before the delivery of possession. *Ib.*
3. Even were it otherwise, the purchaser's acceptance of the deed, after the fire, with knowledge of the loss, would extinguish any claim to indemnity. *Ib.*

VERDICT.

JUDGMENT, 1: TRIAL.

VERIFICATION.

1. It is true that a party may be convicted of perjury in swearing to his belief of that which he knows to be untrue. But the evidence in such a case, and in one where a party swears directly, is quite different. In the former, the prosecution, in addition to negating the principal fact, would be obliged to establish the corrupt motive by affirmative proof. In the other, if the main fact were disproved by sufficient evidence, it would rest upon the accused to show that the swearing was not corrupt, but the result of a mistake, or the like. The *onus* should rest on him, and an affidavit, which will invert the order of proof, ought not to be held sufficient. *Ct. of Appeals*, 1865, *Ingram v. Robbins*, 33 *N. Y.*, 409.
2. A complaint is "duly verified" within section 4 of the act of 1857, in relation to the marine court, if made by one of several plaintiffs, united in interest. It is not necessary to state that the person making it is acquainted with the facts. *N. Y. Com. Pl.*, 1861, *Ballard v. Lockwood*, 1 *Daly*, 158.

CONFESSION OF JUDGMENT, 5-7.

WAIVER.

The voluntary act of the obligors, in giving a bond, under an order of court which affords the party his election to give it or not, is a waiver of any objection to the authority of the judge making the order, to require such a bond. *N. Y. Superior Ct.*, 1863, *Ford v. Townsend*, *Ante*, 159.

MARINE COURT, 1: PLEADING, 19, 31.

WITNESS.

WARRANT.

Any magistrate, having criminal jurisdiction, who takes a deposition, affidavit or complaint, in writing, on which he issues a criminal warrant, search warrant, or other criminal process, must file and preserve the same, and exhibit the same, on the demand of any person affected by the process, for his perusal. Copies allowed to be taken. 1 *Laws of 1866*, 150, ch. 95.

WILL.

1. An officer in the army of the United States in May, 1864, after it had commenced to move on Richmond, wrote and sent a letter to his sister, saying, if he was killed, or did not return, he wanted her to have his property. He was killed in August, 1864.—*Held*, that this portion of the letter was a valid will by a soldier, and should be admitted to probate as such. *Surrogate's Court, Otsego County, Botsford v. Krake, Ante*, 112.
2. Whether a testamentary declaration made by a soldier in actual military service, is valid as a will, although not made in sickness or peril of immediate death, *Quere? Ib.*

WITNESS.

1. Husband and wife cannot be examined either for or against each other, except in cases where they are parties to the suit. [12 *Abb. Pr.*, 246; 5 *Seld.*, 153.] *N. Y. Com. Pl.*, 1862, *Rogers v. Rogers*, 1 *Daly*, 194.
2. That a bank cashier is in general deemed qualified to testify as an expert upon a question of handwriting. *Ct. of Appeals*, 1864, *Dubois v. Baker*, 30 *N. Y.*, 354; affirming *S. C.*, 40 *Barb.*, 556.
3. The plaintiff, in a suit in equity, brought to establish a lost or destroyed will, against the administrators and next of kin of the testator, is not a competent witness in his own behalf, to prove conversations had between himself and the deceased, at and before the time of making the will, on the subject of the will. *Supreme Ct.*, 1865, *Timon v. Claffy*, 45 *Barb.*, 438.
4. In an action brought by a judgment creditor to reach, and apply on his judgment, moneys and property of the judgment debtors, alleged to be in the hands of their attorney and another person, and to be by them fraudulently withheld from the judgment debtors and their creditors, one of the judgment debtors is not disqualified as a witness, on the ground that the action is for his immediate benefit. The benefit to him, in case of a recovery, is mediate—that is, through the medium of another,—the receiver, and by indirection, in the payment of his debts; not immediate by putting into his hands or power the very proceeds of the recovery. [2 *Kern.*, 373; 3 *Id.*, 292.] *Supreme Ct.*, 1859, *Cowing v. Greene*, 45 *Barb.*, 589.
5. Pursuant to a stipulation of the parties, the testimony of M., who was dead, given on a former trial of the case, was read in evidence. Subsequently, the defendant offered to read a deposition of M., in another suit, for the purpose of contradicting his evidence as read, and impeaching him.—*Held*, that the deposition was properly excluded. Had the witness been living, and

WITNESS.

- on the stand, it would not have been competent, by way of impeachment, to show that he made different and contradictory statements on other occasions, without first calling his attention to them. Without this, there is no foundation laid for the evidence. It cannot change the rule that the witness is dead, and the parties have agreed that his evidence might be read as he gave it on a former trial. *Ct. of Appeals*, 1865, *Hubbard v. Briggs*, 31 N. Y., 518, 536.
6. The question to a witness, for the purpose of impeaching his credibility, whether he had not been expelled from an Odd Fellows' lodge;—*Held*, properly excluded, as an affirmative answer would not affect the credibility of the witness. *N. Y. Com. Pl.*, 1860, *Greaton v. Smith*,* 1 *Daly*, 380.
 7. To entitle the examining counsel to show a discrepancy, for the purpose of impeaching the credibility of the witness, it must either appear that the testimony related to a point *material* to the issue on trial, or to a fact brought out on the examination of the adverse counsel. *Ct. of Appeals*, 1864, *Carpenter v. Ward*, 30 N. Y., 243.
 8. A party who cross-examines a witness as to a collateral matter, is concluded by his answers. He cannot draw out collateral statements from the witness, and, for the purpose of discrediting him, show that on some other occasion he stated differently. *Ct. of Appeals*, 1864, *Carpenter v. Ward*, 30 N. Y., 243.
 9. That evidence of former declarations of a witness, inconsistent with his testimony, may be given for the purpose of impeaching his credit. *Chapman v. Brooks*, 31 N. Y., 75.
 10. What questions may properly be asked upon cross-examinations. *Hubbard v. Briggs*, 31 N. Y., 518, 539, 540.
 11. The cross-examination of a witness, as to a conversation had by him, must be limited to that particular subject of the conversation which was brought out on the direct examination. The whole conversation cannot be given on the cross-examination. *N. Y. Com. Pl.*, 1860, *Greaton v. Smith*,* 1 *Daly*, 380.
 12. Testimony of a party offered, not to contradict his own previous testimony, but to obviate the effect of testimony of the adverse party as to a transaction, questioned;—*Held*, admissible. *N. Y. Com. Pl.*, 1860, *Smith v. Ferris*, 1 *Daly*, 18.
 13. Under the provisions of the Code of Procedure, which authorize the examination of parties to actions before the trial, the testimony of a party may be taken before issue joined. The object of allowing a party to be examined, at the instance of his adversary, before trial, was not merely for convenience, but to enable a party to obtain and secure evidence in support of his cause of action or defence. *N. Y. Superior Ct.*, 1865, *McVickar v. Ketchum*, *Ante*, 452; affirming *S. C.*, 19 *Abb. Pr.*, 24.
 14. A party who applies, under the provisions of section 491 of the Code of Procedure, for an order directing an examination of an adverse party before trial, must present an affidavit stating the nature of the action, and if the application be made by the defendant, then the nature of his defence;

* Affirmed, 33 N. Y., 245.

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- and also the name and residence of the person to be examined. Without such an affidavit, a judge is not required to sign a summons or order directing the party to appear. *N. Y. Superior Ct., Chambers, Green v. Herder, 30 How. Pr., 210.*
15. Proceedings to enforce examination of witnesses under Metropolitan Sanitary Act. 1 *Laws of 1866*, 129, § 14, subd. 2, 138, § 27.
 16. Under the amendment of section 399 of the Code, passed in 1865, a prisoner is not a competent witness for himself, upon the trial of the indictment. The act does not apply to criminal cases arising before criminal courts. *Supreme Ct., 1865, Williams v. People, 45 Barb., 201.*
 18. After the dissolution of a partnership by the death of one of its members, the survivor holds the assets, still, as partnership property, and by virtue of his original power as partner. Therefore, he is in no sense the assignee of the deceased partner; and the restriction of section 399 of the Code of Procedure, as to the reception of evidence of transactions with a deceased person, against the executors or assignees of the deceased, does not extend to an action against him. *Supreme Ct., 1865, Tremper v. Conklin, 44 Barb., 456.*
 18. Under section 399 of the Code of Procedure, as amended, the restriction of the right to testify on the part of the living party to any transaction, when the other party to such transaction is dead, depends upon the fact that the action is prosecuted by "an executor, administrator, heir-at-law, or next of kin or assignee of such deceased person, and when they have acquired title to the cause of action immediately from said deceased person." It does not apply to one who is not an executor of the deceased person, who was a party to the transaction, and does not hold and had not acquired title to the cause of action "immediately from the said deceased person." *Supreme Ct., 1865, Collier v. Wenner, 45 Barb., 297.*
 19. The proviso qualifying section 399 of the Code of Procedure as to testimony of parties, amended to read as follows: Provided, however, that the assignor of a thing in action, or any person who has a legal or equitable interest, which may be affected by the event of the action, shall not be examined on behalf of the assignee or party through whom such interest would be affected; nor shall a party to an action be examined on his own behalf, or in behalf of any other party, in respect to any transaction or communication had personally by said assignor, person, or said party respectively, with a deceased person, against parties who are the executors, administrators, devisees, heirs-at-law, next of kin, or survivor of a person or party jointly interested, or assignees of such deceased person, where they have acquired title to the cause of action, or the subject-matter involved in the action, from the deceased person or party jointly interested, or are sued as, or by reason, or in consequence of their being such executors, administrators, devisees, heirs-at-law, next of kin, surviving partners or assignees; nor in respect to any transaction or communication had personally with a person who, at the time of trial, is an insane person or a lunatic, where the action or proceeding is prosecuted or defended on the behalf of such insane person or lunatic, nor in any such action or proceeding as against such parties, shall any party or person be admitted to testify in regard to such matter in behalf of any party whose interest in the action or proceedings (either by voluntary act, or by legal proceedings, or by operation of law), directly or indirectly grows out of, or is founded upon a transaction between the deceased and the party or person called as a witness, or grows out of, or is founded upon any prior or present rights or interest of the party or person called as a witness in or to the estate or property that is the subject of, or involved in the controversy; or where the

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interest of the party for whom he is called substantially represents an interest that the person or party called as a witness has or has had growing out of the transaction of the deceased, about which he is called to testify. But where such executors, administrators, devisees, heirs-at-law, next of kin survivors or assignees shall be examined on their own behalf in regard to any conversation or transaction had between the deceased person and said assignor, or said party or person respectively, then the said assignor, party or person, may be examined in regard to such conversation or transaction but not in regard to any new matter; but if the testimony of a party to an action or proceeding shall have been, or shall be taken, and he shall afterwards die, and after his death the testimony so taken shall be used upon any trial, hearing or proceeding in behalf of his executors, administrators devisees, heirs-at-law, next of kin, survivors or assignees, the other party the assignor or person in interest as aforesaid, or the one through and from whom the said rights or interests have been derived, shall be a competent witness as to any and all matters to which the testimony of the deceased so taken relates. And nothing contained in section 8 of this act shall be held or construed to affect the operation of this section; and nothing herein contained shall be held or construed to give the right to a party in a criminal action, to testify upon the trial thereof. 2 *Laws of 1866*, 1845, ch. 824, § 17.

20. The provisions of section 399 of the Code of Procedure,—enabling a party to be examined as a witness in his own behalf,—do not apply to defendants in criminal prosecutions. They apply only in civil actions and proceedings. *Ct. of Appeals*, 1865, *Williams v. People*, 33 N. Y., 668.
21. A party who attends and is sworn on his own behalf, cannot in any case be allowed to recover fees for such attendance. Witnesses fees are allowable only as disbursements. [Reviewing conflicting authorities.] *Supreme Ct.*, VI. Dist., 1865, *Steere v. Miller*, 28 *How. Pr.*, 266; affirmed in *Ct. of Appeals*, 1865, 30 *Id.*, 7.
22. In order to bring a party into contempt for not appearing to be examined before trial (under section 391 of the Code of Procedure), a *summons* must be *personally* served upon the party to be examined; and a notice of the intended examination must be served upon the attorney of such party, and of any other party adverse to the one applying for the examination. *Supreme Ct.*, 1864, *Van Rensselaer v. Tubbs*, 31 *How. Pr.*, 293.
23. Witnesses allowed for attending before a justice of the peace in a justice's court, or before a commissioner appointed by a justice of the peace, or before a justice of the peace taking deposition to be used in other States,—twenty-five cents for each day's attendance. *Laws of 1866*, 1486, ch. 692, § 9.

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CERTIORARI, 7: ERROR: EXECUTION: MANDAMUS: PROHIBITION.

THE END.



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